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EDITORIAL NOTE

THE rationing of paper makes it impossible to publish Volume VI in four parts of 80 pages each. The present double issue of 96 pages will be followed by two issues of 80 pages each. In order to make full use of the available paper all the contents of the review will be printed in small type and articles and the various sections will not begin on a new page. The first article in this issue is, however, printed in large type as it had been set up before the necessity for these economies arose.

May we also request those readers who have subscribed by means of a Banker's Order to instruct their bankers to increase the annual payments to 16s. and to have these payments made to our bankers, the Midland Bank Limited, Belsize Park Branch, 147 Haverstock Hill, London, N.W.3?

R. S. T. CHORLEY,
for the Editorial Committee.

THE HARRIS TWEED CASE AND FREEDOM OF TRADE

IT is not often that an English decision openly reveals the political and social ideals which support the law. American law, in this respect, is very different. The Constitution, as the supreme source of law, enforceable by the Courts, necessitates a legal interpretation of the political, economic and social principles, such as freedom of person or property, which it formulates in

broad terms. But in English law, principles such as freedom of property or trade, form merely the basic theme. There is, in the absence of a specific law, no basis for an action founded on freedom of property, person or trade. These and other principles appear at random in judgments when a judge wishes to give emphasis to a decision; but their chief importance lies not in any specific legal protection for the citizen; it lies in a mental background and in principles of interpretation which they supply to those administering the law. Consequently they remain vague and indistinct. That has the advantage of adaptability and elasticity, but the disadvantage of all inarticulate and vague ideology.

It is therefore an event of more than ordinary importance if a decision of the House of Lords uncovers some of the most important ideological issues. The *Harris Tweed* case[1] not only shows more clearly than any previous decision the elusiveness of the ideal of freedom of trade, it demonstrates also the evolution which economic individualism has undergone in the last fifty years—the development from an almost pure Benthamism to a position where economic groups struggle with each other, with authority looking on as an umpire who attempts to interfere little and to be impartial.

The Harris Tweed case is a conspiracy case. For the analytical jurist it adds one more to the massive number of decisions which have attempted to grapple with that mysterious tort, in great length but with scant success. The chief stages are marked by the "Trilogy" consisting of the *Mogul* case,[2] *Allen* v. *Flood*[3] and *Quinn* v. *Leathem*,[4] by *Sorrell* v. *Smith*,[5] *Thorne* v. *Motor Trade Association*[6] and now the *Harris Tweed* case. No attempt will be made, in this article, to add to the numerous efforts to reconcile these and lesser cases on analytical grounds. After many hesitations and discussions, it is now generally accepted[7] that conspiracy, to be actionable, requires (*a*) joint action by at least two persons, (*b*) malice, to be understood as action devoid of a reasonable purpose. Both these propositions are affirmed by the House of Lords in the *Harris Tweed* case,[8] and both demonstrate the complete impasse in which this purely analytical approach has landed the law. The origin of conspiracy in criminal law may do

[1] *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch and Another* (1942), 1 All E.R. 142.
[2] (1892), A.C.25.
[3] (1898), A.C. 1.
[4] (1901), A.C. 495.
[5] (1925), A.C. 700.
[6] (1937), A.C. 797.
[7] *Cf.* Salmond, *Torts*, s. 156; Winfield, *Tort*, s. 13.
[8] *Cf.* in particular, the judgments of Lord Simon, L.C., and Lord Wright in the *Harris Tweed* case.

as an historical explanation, but the result, as often pointed out, is that the joint action of two unemployed can be conspiracy, while the action of a limited company, controlling, perhaps, the entire steel or oil output of a country and ten thousands of people in its employment, cannot. As for the test of malice, it is enough to refer to the brilliant and devastating analysis of Evatt, J., in *McKernan* v. *Fraser*[9] which disclosed no fewer than twenty-four definitions of malice and eventually came to the conclusion that only "disinterested malevolence"[10] that is pure spite unconnected with any economic purpose could be actionable malice. It is significant that, of all the leading English decisions, only *Quinn* v. *Leathem*[11] was based on malice. The jury found that the defendants had maliciously conspired to induce the plaintiffs' customers or servants not to deal with the plaintiff or not to continue in his employment, and a House which was not too friendly towards collective labour action, based upon this finding a judgment awarding damages. The comment of Lord Wright, in the *Harris Tweed* case,[12] shows that the decision is difficult to support; in every subsequent case, some economic object was found to exist on the part of the defendants. Indeed, it is difficult to imagine the costly and risky apparatus of collective action being started to satisfy personal spite, in the absence of economic objects, of the purpose of securing some direct or indirect advantage for the group involved. This test, coupled with that of "joint action" has served to divorce the law of conspiracy from social reality. This article will attempt a brief survey of the matter in terms of the type of social conflict involved, and it will not confine itself to conspiracy, though this provides most of the material, but include certain aspects of the law of contract (restraint of trade) and of the law of associations (discipline over members).

Our central theme will be the principle of freedom of trade. What is its precise meaning in the English law to-day, and what evolution has it undergone since it was stated in its classical and, on the face of it, still authoritative form?[13] The following

[9] (1931), 46 C.L.R. 343.

[10] A formula devised by Cardozo, J., in *Nanay* v. *Raimist* (1931), 255 N.Y. 319.

[11] (1901), A.C. 495.

[12] (1942), 1 All E.R., p. 164.

[13] The theme of this article is the transition from individual freedom of trade to corporate action. The problem of freedom of labour, which was originally regarded as one aspect of freedom of trade, needs separate consideration, though the two problems are, of course, closely interrelated. The way in which the House of Lords has attempted to protect the personal freedom of labour, by its distinction between restrictive covenants concerning business goodwill and restrictive covenants preventing the use of an employee's skill, is therefore not treated in this article.

appear to be the principal types of social conflict by which the meaning, scope and limitations of freedom of trade can be assessed—

1. Competition between business rivals (single firm *versus* single firm or combine).
2. Conflict between groups of trade interests.
3. Conflict between Labour and Employers (single or combine).
4. Conflict between rival Labour groups.
5. Conflict between rival business groups, with Employers and Labour within each group collaborating.

The necessary complement to the legal limits of collective action against another party is provided by the extent to which the law protects internal group discipline. There are three main types of cases—

1. Contractual action arising out of cartel agreements (controlling prices or production).
2. Actions by and against trade associations (black lists and fines).
3. Disciplinary actions arising out of reglementation or boycott by trade or professional organisations (Trade Unions, British Medical Association, etc.).

I. Freedom of Business Competition.

1. The famous *Mogul* case[14] provides not only a striking illustration of unfettered and ruthless competition between business rivals; it is also the best starting point for our analysis, as the classical embodiment of Benthamite economic liberalism in the law. Like a number of other House of Lords decisions from the last decade of the nineteenth century, the *Mogul* case reflects the outlook of a judiciary brought up in conceptions and under conditions which had already largely lost their validity at the time of the judgment. The defendants, a group of shipping companies, had ousted the plaintiff, a rival trader, by threatening his agents with boycott if they continued to act for him, and by deliberately undercutting the plaintiff, at a temporary loss to themselves. The House found that there was no malice as required for a conspiracy action, but it is the economic creed of the law lords, which gives the clue to the decision. Lord Watson said—

> "I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest price at which traders can sell or hire, for the purpose of protecting

[14] (1892), A.C. 25.

or extending their business without committing a legal wrong which will subject them to damages" (l.c. p. 40).

It is true that this statement rather avoids the question whether the means employed did not overstep the limits of law, but it reflects the emphatic distrust of any controlling function of public authority which would interfere with the free play of economic forces. Even more sweeping are Lord Halsbury's categorical words—

"All are free to trade upon what terms they like" (p. 38).

Only a few years later Dicey, in his *Law and Opinion in England during the Nineteenth Century*, clearly saw the writing on the wall and brilliantly analysed the dialectic antithesis to which Benthamite individualism coupled with its legislative zeal to ensure individual freedom had led, and foreshadowed state socialism; but such thoughts were far from the minds of the judiciary for a long time to come.

2. A comparison between the decision in the *Mogul* case and those given by the Court of Appeal in the next year, in *Temperton* v. *Russell*,[15] and by the House of Lords, some years later, in *Quinn* v. *Leathem*,[16] shows how difficult it was for the judiciary to apply the principles of freedom of trade so eloquently and categorically formulated for business competition to similar action taken by organised Labour against employers. In *Temperton* v. *Russell*, the defendants, as members of a joint committee of trade unions in Hull, prevented the supply of building materials to a firm of builders who refused to comply with a rule agreed upon by the unions and designed to make the master builders of Hull observe certain rules regarding building operations thought to be for the benefit of the union members. In the words of Lord Esher, M.R., the defendants were not "actuated . . . by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do."

Nevertheless, the action succeeded, the chief authority being *Lumley* v. *Gye*.[17] Inducing persons not to enter into a contract was held to be on a par with inducement to break a contract.

The effect of this decision, remarkable when contrasted with the *Mogul* case, was somewhat tempered by the decision of the House of Lords in *Allen* v. *Flood*.[18]

Here a liberally-minded House dismissed an action for damages

[15] (1893), 1 Q.B. 715.
[16] (1901), A.C. 495.
[17] 2 E. & B. 216.
[18] (1901), A.C. 495.

by two shipwrights against the delegate of an ironworkers' trade union, who had told their employer that all ironworkers would be called out by the union, unless he dismissed the plaintiffs. This decision, given a few years after the *Mogul* case, seemed to assimilate the legal position of labour pressure to that of business pressure against rivals. But in *Quinn* v. *Leathem*, a differently composed House took great pains to explain *Allen* v. *Flood*, somewhat artificially, as being concerned with the unauthorised and self-styled action of a single union official, and therefore not being concerned with conspiracy at all. In *Quinn* v. *Leathem*[19] the defendants, as officials of a trade union, wished to compel the plaintiff, a butcher, to dismiss non-union men by threatening his chief customer with the calling out of his employees. The plaintiff, after the first warning, had declared his willingness to let his men join the union and pay their fines and entrance money, but the defendants had refused the offer, apparently in order to show the men that it was unwise to remain outside the union. This was ruthless action, but no more ruthless, and no less directly connected with the attainment of a legitimate economic object than the action of the defendants in the *Mogul* case. Yet few of the Lords in *Quinn*'s case even referred to the *Mogul* case, so remote seemed the idea that what was legitimate coercion in the business world was legitimate too in conflicts between labour and employers. The union action in *Quinn* v. *Leathem* was harsh, but there was no evidence of any personal motive in the action against the plaintiff or his employees. There was probably no conscious discrimination, but simply the difficulty in the minds of judges versed in the ways of business and trade to grasp fully the implications of organised Labour action.[20] Theoretically, Lord Lindley's statement is impeccable (l.c., p. 539)—

> "According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobodys rights are infringed. The law is the same for all persons, whatever their calling; it applies to masters as well as to men; the proviso however is all-important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm, but of serious annoyance and damage, is, *prima facie*, at all events, a wrong inflicted on the persons concerned;

[19] (1901), A.C. 495.

[20] *Cf.* among others, the pungent comments of Holmes, J., in *Vegelahn* v. *Guntner* (1896), 167 Mass. 168, and of Evatt, J., in *McKernan* v. *Fraser* (46 C.L.R. 382).

and in considering whether coercion has been applied or not, numbers cannot be disregarded."

But the real crux of the matter lies in the limits of the "rights" which must not be infringed. In attempting to distinguish the case before him from the *Glasgow Fleshers'* case[21]—where a butchers' union was held not liable in damages for threatening salesmen that they would not buy from them, if they continued to sell meat to the plaintiff, with the object of limiting competition—Lord Lindley held that in the latter case no one's rights had been infringed, whilst, in *Quinn*'s case, the coercion of the plaintiff's customers and servants had infringed their liberty as well as his. As Scrutton, L.J., pointed out in *Ware and De Frevill* v. *Motor Trade Association*,[22] this distinction is quite unintelligible.

While *Temperton*'s and *Quinn*'s cases thus left organised Labour in a position much more unfavourable than that of business competitors, the balance was more than redressed by the Trade Unions Act of 1906, which gave trade unions an immunity for actions which would otherwise be actionable conspiracy. The Act of 1927 narrowed the field of application of this immunity by the much more restricted definition of trade disputes, but left it untouched in principle.

Thus, after the removal of the disabilities which, at first, had outlawed collective labour action, the law no longer presented essential obstacles to the important social and economic development, which made individual freedom of trade and individual rivalry more and more a matter of the past, and substituted for it the disciplined organisation and collective action of groups within the State.

Employers' Federations and Labour Unions, Production and Price Cartels, Trade Associations and Professional Organisations, all tended to close their ranks against growing pressure from conflicting interests and organisations. Capitalists attempt to organise a particular industry by complete reglementation and standardisation of production, prices, marketing, conditions of labour, etc. Trade Unions aim at a monopoly of collective bargaining, the fullest expression of which is the "closed shop" principle, so hotly contested in the United States. Professional organisations, reviving guild policy, discipline members' conduct and activities, jealous of outsiders and competitors.

Individual freedom of movement is more and more curtailed.

[21] *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (1898), 35 Sc.L.R. 645.

[22] (1921), 3 K.B. at p. 68.

Meanwhile the law, reflecting State policy, attempts to remain a neutral umpire, content to check certain excesses, but otherwise leaving the contending groups to fight it out and maintaining all the time uneasily the myth of individual freedom of trade.

3. The Trade Union Act of 1906 is probably responsible for the absence of any House of Lords decisions on Conspiracy and other problems of combined action until well after the first world war. For *Conway* v. *Wade*[23] only deals with a side issue, and reflects the desire of the House to counteract the effects of the Act by a restrictive interpretation of the scope of legitimate Trade Union activity, a tendency continued (by a severe restriction of the scope of legitimate strikes) by the Act of 1927.

Meanwhile, group organisation and action had become more and more predominant, and the next great case after the "trilogy," *Sorrell* v. *Smith*[24] deals with a conflict between two powerful trade groups, a trade union of newspaper retailers on one side, and a committee of newspaper proprietors on the other. The dispute arose from a conflict of economic policy. The retailers wished to prevent competition by new retailers, the proprietors wished to encourage sales by an increase in retailers. Both exerted pressure upon the middle-men, wholesalers; the plaintiff, at the order of his union, by transferring his custom from a wholesaler who also supplied newcomers, to another wholesaler; the defendants by threatening that latter wholesaler to stop supplies, unless he ceased to deal with the plaintiff. The plaintiffs' suit for an injunction to restrain the defendants was unsuccessful, and the decision seems obviously right. Not only from a formal legal point of view, the attitude of neutrality towards economic groups struggling for enforcement of their economic aims, by the law of a State which has itself no active economic policy, here happened to correspond to a rough balance of strength, between the contending groups, proprietors and retailers. But the case illustrates how far social reality was already removed from the state of affairs idealised by the *Mogul* case, where every individual had full economic freedom and, so Bentham thought, all would come out well for the community.

4. The cases of such conflicts are not confined to rival business groups or to a struggle between Capital and Labour. At least two important decisions deal with conflicts between rival labour associations. *Reynolds* v. *Shipping Federation*[25] reveals, in the first place, a struggle between the powerful National Union of

[23] (1909), A.C. 510.
[24] (1925), A.C. 700.
[25] (1924) 1 Ch. 28.

Seamen and Firemen, attempting to create a single source of supply of seamen and firemen for British shipping, and a rebel union which wanted to break this monopoly. In the second place it shows, as later the *Harris Tweed* case, co-operation between employers and labour against outsiders, and it thus helps to explode another myth, that of the unity of the working class. In this case, the Shipping Federation, comprising nearly all the shipowners of the country, and the National Union, had agreed to recognise the decisions of the National Maritime Board, a kind of successor to the war-time official Board established by the Ministry of Shipping. The labour supply was controlled by the issue of a card to members of the National Union, without which it was impossible to obtain employment on any ship belonging to the Federation. It was against this method that the plaintiff, a member of the rebel union, unsuccessfully brought a conspiracy action.

The Australian case of *McKernan* v. *Fraser*[26] also concerned a conflict between rival unions of seamen. The members of the established union refused to sail with those of a rebel union. The case gave the occasion for the masterly judgment of Evatt, J., which is certainly the greatest judicial contribution made to the problem, and exposes the fallacy of the malice test when applied to class and group action of the type dealt with in all the judgments hitherto analysed.

The two decisions give us a glimpse of the social trends that are gradually taking shape: Labour is getting organised—at least in some parts of the world and in some branches of the industry—in such strength that the main trade union movement can aim at not only controlling individual workmen, but at establishing a monopoly of labour supply and conditions. Any new labour organisation must fight not so much against employers who sometimes support or welcome it—but against the existing Labour organisation. This development towards guild monopoly is reinforced by the tendency of State authority to reduce labour strife by leaning upon the predominant trade union movement, and a corresponding tendency on the part of employers' federations which, for different reasons, have come to prefer negotiation to strife no less than the officially recognised labour movement. They may want protection from foreign competition, or from an internal rival, or they may live on State orders, as in times of rearmament or war. Where employers and Labour co-operate within a particular industry, without official intervention, we get different types of syndicalism; where the State deals with and

[26] (1931), 46 C.L.R. 343.

protects the respective organisations of employers and workmen, we get, after a time of transition, an active social and industrial policy dependent upon the political philosophy which dominates the Government.

5. The *Harris Tweed* case[27] arose shortly before the outbreak of the second world war from a situation which war developments have greatly modified. The conflict was one between the original Harris Tweed industry of the Outer Hebrides, which has the yarn spun by hand in the islands and woven there in the crofters' cottages, and some competing island mills, which had their yarn spun on the mainland by cheaper commercial methods, but the cloth woven by island crofters. This latter method also qualified for the trade mark "Harris Tweed." By far the greater part of the Harris Tweed industry on the island of Lewis was apparently in the hands of millowners, organised in an association and employing members of the Transport and General Workers Union; to the same union belonged all the dockers at the port where imported yarns were unloaded. The Union wanted to protect its members and fight non-union mills, by depriving them of their means of competition; the millowners' association wanted to rid itself of the competition of mainland spun yarn. The Transport and General Workers Union and the Millowners Association thus had parallel interests and co-operated in every way. The action taken was a refusal by the dockers, who, though not in the Harris Tweed industry, were members of the same union, to unload any more yarn imported from the mainland and consigned to the plaintiffs, seven small producers. On the part of the trade union, this was part of a wider policy designed to secure a minimum selling price for island cloth and a collective bargaining agreement with the Millowners Association. These latter negotiations did not lead to any result, and there was some difference of opinion among the judges whether the Secretary of the Association was a party to the alleged conspiracy of the two defendants sued as officials of the Union. The result was not affected since the combined action was held not to be an actionable conspiracy. What is certain is that the employers' association and the workers' union co-operated against a number of outsiders who were owner-producers.

The action was, apparently by agreement, not brought against the officials as agents of the trade union, but as individuals, so that the Trade Union Act of 1906 could not apply and the problem was one of common law conspiracy. The Lords were unanimous in dismissing the action, and their judgments show

[27] (1942), 1 All E.R. 142.

how much greater the understanding of modern British judges is for the scope of collective action in industrial strife. There was no shadow of disagreement on the decisive point: that the action taken by the union was not "malicious," but for the protection of legitimate interests. Such legitimate interests are the prevention of under-cutting and unregulated competition, or the creation of a better basis for collective bargaining. In the judgment of Lord Simon, L.C., it is sufficient that such objects should form the predominant purpose, even if it should be accompanied by feelings of personal satisfaction at teaching the opponent a lesson. Lord Simon felt strongly critical of the use of "motive" and "intention" in this connection and replaced these by "object" or "purpose." This shows a significant realisation of the impasse to which the investigation of subjective feelings and motives has led in the field of the social struggle between groups and classes. Lord Wright strongly reinforced this view, which commends itself not only as the only practicable approach to economic problems, but also as a necessary brake on jury prejudice. To quote Lord Wright—

> "To leave to a jury to decide on the basis of an internal mental state, rather than on the facts from which intent is to be inferred, may be to leave the issue in the hands of the jury as clay to mould at their will . . . Mere malevolence does not damage anyone. I cannot see how the pursuit of a legitimate practical object can be vitiated by glee at the adversary's expected discomfiture. Such glee, however deplorable, cannot affect the practical result."

The chief interest of Lord Wright's judgment lies in the way in which it faces some of the economic and social implications of the dispute instead of being content with the occasional quotation of such stock phrases as "freedom of trade." It deals both with the limits of such alleged "freedom" and with the respective position of employers and workmen's interests in an issue like the present one.

> ". . . It is necessary to ascertain what constitutes the tort alleged. It cannot be merely that the appellants' right to freedom in conducting their trade has been interfered with. That right is not absolute or unconditional. It is only a particular aspect of the citizen's right to personal freedom, and, like other aspects of that right, is qualified by various legal limitations, either be statute or by common law. Such limitations are inevitable in organised societies, where the rights

> of individuals may clash. In commercial affairs, each trader's rights are qualified by the right of others to compete. Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining . . ."

That one of the paramount problems of law is the reconciliation of the freedom of one individual with that of every other in the society, has indeed been the pre-occupation of most legal philosophers. Starting from widely different premises, Kant, Spencer, Bentham, Stammler, among others, agree in seeing the aim of law in the securing of the maximum freedom for every individual which is compatible with an equal measure of freedom for everyone else. The problem of a legal order lies not in the recognition of this elementary truth, but in the way to realise it, in the light of social and economic conditions. In regard to personal freedom, the law of every civilised state has long recognised the need to limit the freedom of each individual by criminal law, police supervision and a host of other restrictive measures. But the glittering ideology of freedom of trade, particularly appealing to a legal profession whose social background was the same as that of the commercial and industrial *entrepreneur* who, for the greater part of the nineteenth century, derived benefit from an unrestricted interpretation of freedom of trade, has obscured the inherent contradiction of such an ideal. Many years before the *Mogul* case Marx pointed out how the economic freedom of capitalist enterprise would lead to its own extermination, by the formation of groups and monopolies which would suppress the small *entrepreneur*. But even to lawyers unversed in Marxist dialectics, the *Mogul* case might have shown the fallacy of unchecked freedom of trade. In that case, the stronger association could, in the name of that freedom, squeeze the weaker out of business. As pointed out, in the absence of an active economic state policy, the various economic interests within the State resorted to an increasingly rigid corporate policy, in order to counterbalance pressure from other organised interests. But it is obvious that this policy must also lead to a deadlock; either one group proves decidedly stronger and crushes opponents, or various groups, such as employers and workmen's unions, producers and retailers, or competing undertakings within the same industry, keep each other in check, with an effect which is bound to be paralysing at times of economic stress or national emergency. On this aspect of the matter, neither Lord Wright nor any of the other Law Lords had any comment to make. But Lord Wright did

remark on the question of the struggle between Capital and Labour—

> "It is true that employers and workmen are often at variance because the special interest of each side conflicts in the material respect, as, for instance, in questions of wages, conditions of hours of work, exclusion of non-union labour, but, apart from these differences in interest, both employers and workmen have a common interest in the prosperity of their industry, though the interest of one side may be in profits and of the other in wages. Hence a wider and truer view is that there is a community of interest" (p. 166).

The *Harris Tweed* case certainly does demonstrate that the theory of the necessary conflict between capital and labour is an over-simplification, or, at any rate, to some extent overtaken by developments not existent in the earlier stages of industrial revolution. But the alternative theory of the community of interest between employers and workmen must also be subjected to close scrutiny. It is a theory praised by one section of the syndicalist movement and, above all, by Fascism. But before we examine this theory any further, the analysis of the eclipse of freedom of trade must be supplemented by a survey of the internal legal structure of the group entities which have so largely replaced the individual in the economic struggle.

II. The Enforcement of Corporate Discipline in Trade Matters.

The growth of group action in the pursuit of economic interests could be effective only if the group organisation concerned could exercise adequate control over its members and those within its sphere of action.

1. Enforcement of Cartel Agreements.

A number of actions has arisen out of agreements within a particular trade or industry, by which the parties, in the common interest, agreed to observe a certain price or a production quota, to form a pool or to employ another of the many methods adopted in modern economic life. These actions are purely contractual, and the small number of Court decisions reported seems to show a definite movement from the protection of individual economic freedom to the recognition of the legitimate purposes of group control. But it is difficult to follow a clear line, because the decisions, like those on Conspiracy, avoid any conscious appreciation of the social and economic issues involved and

contain, instead, haphazard and improvised excursions into economic theory.

In *Hilton* v. *Eckersley*[28] eighteen mill owners agreed to conform with the resolutions of a majority present at any meeting, in regard to wages, working hours, engagement of workmen, and general management. The Court of Exchequer held that "a contract by which the obligors agree to carry on their trade not freely as they ought to do, but in conformity to the will of others . . . is contrary to public policy."

In *Joseph Evans* v. *Heathcote*[29] a number of cased tube manufacturers had, by agreement, regulated prices and output. Any manufacturer who exceeded his quota of production, had to pay a certain proportionate amount into a pool, from which those who had not reached their quota were to be compensated. The association was not compelled to buy from the individual manufacturers, but they were under an obligation to sell to the association. The plaintiff claimed his share, in accordance with the agreement, not having reached his quota, and, strangely enough, it was the association which successfully pleaded invalidity of the agreement, on the ground of the plaintiff's restriction of economic freedom. The defence succeeded (though the plaintiff recovered on another ground) because, in the judgment of Scrutton, L.J.: (1) the plaintiff was not bound to sell except to five named firms, who were under no obligation to buy from him; and (2) the plaintiff had no power to withdraw from the agreement.

A similarly strong attachment to individual freedom of competition and economic initiative was shown by the House of Lords, in the *Irish Dairy* case.[30] An Irish co-operative society for the manufacture of cheese and butter took all the milk output of its members at current prices. The members were not to sell, without consent, to any other creamery within a certain area. They had no right to withdraw from this obligation except by transfer of their shares. The majority judgments, especially that of Lord Birkenhead, thought that the consent to a transfer of shares, which was necessary, would not be given "unless in the most exceptional cases," and a member was thus practically tied for ever to this restriction of his economic liberty, whereas Lord Parmoor, in his dissenting judgment, said that "there is positive evidence that whenever a person has applied for a transfer it has been granted . . ." There was, thus, a conflict of opinion as to

[28] (1855), 6 El. & Bl. 47.
[29] (1915), 1 K.B. 418.
[30] *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Soc.* (1919), A.C. 548.

the degree to which the economic freedom of members had, in fact, been restricted.[31] But the main difference was on the principle. Lord Finlay expressed the majority view by the following words—

> "Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labour or talent, by any contract that he enters into. This is equally applicable to the right to sell his goods."

Lord Parmoor's dissenting judgment struck a very different note. It emphasised two aspects ignored by the majority: (1) that a co-operative society was a voluntary association for the common benefit of all its members who share in the shaping of its policy; and (2) that the obligations and restrictions were not unilateral, but the consideration for the obligation of the plaintiff not to sell milk to other persons or societies was to be found in the society's obligation to purchase all his milk.

> "The basic idea is co-operation . . . No member of the society is subjected to the risk of selling his produce at a price dictated by an outside purchasing body, for the purposes of profit, and I can see no reason for the suggestion that the appellant, and other members of the respondent society, are subjected to unreasonable conditions by an obligation to sell milk at a price to be fixed by a committee of their own choice in the interest of the members of the society, and which it should be assumed, in the absence of evidence to the contrary, will be fairly fixed in the common interest of all parties concerned."

The distinction between contractual and corporate relationship is familiar to continental, but unfamiliar to English legal thinking. Maitland has brilliantly analysed[32] the way in which Contract and Trust are made to explain and represent all the relations arising from membership of an unincorporated association. This difference of approach is itself a symbol of the individualistic

[31] There is nothing in the reported judgments of either the House or of the lower Courts* to contradict Lord Parmoor's statement of the facts. Barton, J., only said that "it would be difficult for a man with ten or twenty cows, and still more difficult for a man with forty or fifty cows to find, within the area of the Society's operations, a transferee . . ., if this rule is a good and binding one." He went on to point out that company law refused to interfere with the decision of the directors, unless they had acted improperly, which it was for the complainant to prove. It was not disputed that the defendants would not encourage a proposed transfer which would strengthen a rival creamery.

* (1918), 1 I.R. 313.

[32] *Selected Essays*; *cf.*, in particular, "Trust and Corporation," and "Moral Personality and Legal Personality."

tradition of English law, and Lord Parmoor had probably a keen appreciation of the shape of things to come when he thought that the discipline enforced by an association upon its members could not be brushed aside by an invocation of an imaginary freedom of economic movement, which economic developments might long have made illusory. There is no doubt that the categories of Contract and Trust are no longer adequate to explain the legal character of group action, whether by corporate or unincorporated groups. Subsequent decisions which present, of course, an incomplete and somewhat haphazard selection from the different types of economic action show an increasing judicial recognition of the power of the group to enforce the restrictions of economic freedom of the individuals whose economic interests it represents. But before we attempt an analysis of these decisions, and of the trend which they reveal, it should be observed that, even at the time of *Evans'* and *McEllistrim's* cases, the House of Lords and other high tribunals had repeatedly recognised combined action which restricted the economic freedom of the members for a common purpose. In *A.G. of Australia* v. *Adelaide S.S. Co.*,[33] agreements between various coal-mine and ship owners designed to cut out competition were held not to infringe the Australian Industries Preservation Act, 1906, since they were not concluded with intent to restrain trade or commence to the detriment of the "public" nor an attempt to monopolise.

Lord Parker, who delivered the judgment of the Judicial Committee, said that, though, speaking generally, it was the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet, in certain circumstances it was in the interest of the individual to contract in restraint of such freedom, and the community, if interested in maintaining freedom of trade, was equally interested in maintaining freedom of contract within reasonable limits. The decision of the House of Lords in the famous *Salt* case[34] was no less emphatic in stressing the benefits of restrictive agreements to control supply and prices. The plaintiff company was a combination of salt manufacturers established in order to regulate supply and keep up prices. It had practical control of the inland salt market. The members of the combination were entitled to be appointed as distributors. The defendants, themselves not members of the company, undertook to supply to it, for four years, 18,000 tons of salt per annum

[33] (1913), A.C. 781.
[34] *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1914), A.C. 467.

at a price of 8s. per ton and not to make other salt for sale. They had an option of buying back the whole or part of the supply at the current selling price, which was no less than 18s. per ton, and to act as distributors. This agreement was held to be valid. The most objectionable aspect of the decision is its omission to consider whether an agreement is in accordance with public interest that quite obviously enabled a combine to maintain a monopoly over a vital commodity, and to enforce prices the reasonableness of which in regard to the public can be judged by the difference between the purchasing price of 8s. and the selling price of 18s. per ton. Although the law is quite clear that not only the interest of the parties but that of the public is to be considered in testing the validity of an agreement in restraint of trade, the latter is invariably brushed aside with the observation, that only in exceptional cases what is reasonable between the parties is not also reasonable towards the public. This is indeed a remarkable judicial contribution to the social and economic problems of monopoly control of commodities, but we cannot pursue this aspect of the matter any further here. The House certainly had no doubt that the restriction of economic freedom imposed upon the plaintiff was not unreasonable. Lord Haldane observed that an ill-regulated supply and unremunerative prices may be a disadvantage to the public. It is difficult to see why similar considerations should not have applied in the *Irish Dairy* case. Some commentators may be inclined to attribute the divergence to social prejudice, but a truer explanation is probably the confused and erratic attitude of Law Courts towards economic problems. Lord Finlay, in *Crown Milling Co.* v. *The King*,[35] gave expression to a widespread judicial illusion when he said that it is not for any tribunal to adjudicate between conflicting theories of political economy; but every decision commented on in this article shows how often judges have taken sides in economic issues, though often unconsciously and mostly in the form of improvised and unscientific theories.

A decade after *Evans* v. *Heathcote*, the Court of Appeal had no hesitation in declaring valid an agreement by which the defendant had joined a society formed to organise the marketing of home-grown hops through the society, and the defendant undertook to deliver to the plaintiffs all hops grown on certain land. He attempted to get out of his obligation by leasing his land, with hops almost ready to pick, to a company which he himself controlled. Scrutton, L.J., emphasised that Courts now viewed with favour restraints of trade imposed between equal

[35] (1927), A.C. 394.

contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties.[36]

The steady increase of collective action for the protection of certain economic interests has more and more led, from a comparatively loose contractual form, to a tighter structural organisation, mostly in the form of trade and other, usually unincorporated, associations. The principal object of these associations is the maintenance of minimum prices by a rigid control of wholesalers and retailers. Obviously such control can be effectively attempted only where competition between producers has been decisively curtailed or excluded. Price control within any industry is the direct result of a combination which makes substantial control of the market possible. The most rigid and universal price control scheme in Britain is that of the Tobacco Trade, and it is the tobacco industry where manufacture is almost completely monopolised. But effective schemes have been evolved by many other trades, among them the Proprietary Articles Trade, the Book Trade and the Motor Trade. Though there is variety in details, the basic principles are the same. An association is formed which comprises sometimes manufacturers only, but often wholesalers and retailers as well. The association, whose main object is usually the fixing of wholesalers' and retailers' prices (manufacturers' prices are not fixed) concludes a number of agreements with the different sections of the trade, by which both wholesalers and retailers undertake not to supply to or buy from price cutters. The principal means of enforcement is the black list system, which has come before the Courts on several occasions. The contractual side is revealed, for example, in *Imperial Tobacco, Ltd.* v. *Parslay*,[37] where the plaintiffs had fixed liquidated damages of £15 for every breach of the clause in the agreement with the retailer forbidding undercutting. The legality of the black list scheme was finally recognised by the House of Lords in *Thorne* v. *Motor Trade Association*,[38] and the protracted controversy between the Court of Appeal and the Court of Criminal Appeal thus settled. Both the placing of a member on the stop list and the alternative of a fine to prevent black-listing were declared legal, provided the action is a reasonable pursuit of legitimate business interests. In that case it is neither criminal blackmail nor civil conspiracy. From the judgments in *Thorne*'s case it can be surmised that only action dictated by personal or vindictive

[36] *English Hopgrowers, Ltd.* v. *Dering* (1928), 2 K.B. 174.
[37] 52 T.L.R. 585.
[38] (1937), A.C. 797.

motives, Justice Cardozo's "disinterested malevolence" or the demand of an extortionate fine would make the action illegal. Thus a further important step was taken in legitimating collective action for the protection of economic group interests. The law authorised corporate action which eliminated freedom of trade for the individual, and it refused to interfere, except in very rare cases. The attitude was still neutrality, with silent abandonment of the liberal economic ideals of previous generations.

The autonomy of group organisation and the power of discipline of the corporate institution which represents a particular interest, is further strengthened by the refusal of Law Courts to interfere with disciplinary measures, save in exceptional circumstances. An interesting illustration is *McLean* v. *Workers' Union*,[39] where Maugham, J., refused to interfere with the expulsion of a member of a trade union as a disciplinary measure unless certain elementary principles were ignored.

> "There is no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or action of the expelling tribunal may be, provided that it acts in good faith."

The same principles have been applied to all sorts of professional organisations which have thus been enabled to exercise a guild-like control over the particular field in which they operate. Thus, in *Weinberger* v. *Inglis*[40] the House of Lords refused to examine the merits of the expulsion of a naturalised German member by the Stock Exchange (then unincorporated) during the war. In *Thomson* v. *British Medical Association*[41] the Judicial Committee refused to follow the attempt made by McCardie, J. in *Pratt* v. *British Medical Association*,[42] to control and make actionable the boycotting and professional ostracism of a medical practitioner by the organised medical profession, and similar principles apply, of course, to other professions, such as the Inns of Court, the Law Society, and the accountants' organisations.

Conclusions

Two factors, above all, make it difficult to draw full and satisfactory conclusions from the decisions analysed in this article. One is the casualness in the selection of problems which come or do not come before the Courts, coupled with the impetus that the expense of ordinary litigation has given to arbitration.

[39] (1929), 1 Ch. 602.
[40] (1919), A.C. 606.
[41] (1924), A.C. 764.
[42] (1919), 1 K.B. 244.

The other is the almost universal refusal of the British judiciary to enter into the economic implications of law, even where it is most closely related to economics. Nevertheless, it is possible to trace a fairly clear pattern of development. It may be thus summarised—

1. Attachment to the ideal of individual freedom of trade and economic movement has dominated the British judiciary in the past few generations. It has been shaped mainly against the background of free competition in business and trade.

2. Individual freedom of economic movement, in all spheres, has increasingly been displaced by the self-organisation of the different economic interests. It has led both to a predominance of collective action against opposing interests, and to a rigid policy of disciplinary control and, if necessary, ostracising of outsiders or rebels within a particular group by the predominant organisation.

3. The Courts have gradually come to recognise as legitimate, within very wide limits, the power of group organisation to replace the individual in the economic struggle. The recognition, at first halting in the case of collective labour action, is now extended to all types of labour, trade and professional organisations, and the checks imposed by the test of reasonableness (in regard to conspiracy, restrictive covenants and blackmail) would operate only in very exceptional cases.

4. The public at large, representing the bulk of consumers and users, in the absence of group organisation, remains no more than a spectator and, often, a victim in the struggle of organised interests. There does not appear to be a single English decision in which consideration of what is reasonable in the interest of the public has influenced or altered a decision reached by consideration of what is reasonable between the parties.

5. The Courts, in conformity with the general policy of English law, have striven to maintain neutrality in the struggle of economic and social interests. In practice, this attitude leads to the attainment of a largely monopolistic control by the most powerful group.

6. While, to this extent, Marxist analysis has been vindicated, by social and legal development, this is not the case in regard to the unity of working-class action. A number of recent cases shows working-class organisations in co-operation with employers' organisations, sometimes against a rival working-class organisation.

The *Harris Tweed* case ends the story of the development at a point just before the outbreak of the present war. War

developments are obviously bound to produce great changes. This is not the place for their analysis. So far it seems that, as in other countries, the State, under military and social exigencies, has assumed a more active part in the control and direction of economic movements. The general policy is to use the predominant organisation within each section as partner and assistant. This, for the time being, has increased the monopolistic character of these organisations, within their sphere of interests. The leading producers and employers, the principal trade unions, are, at present, nearer to complete control in their particular field than ever before. The small producer, the rival union, and the individual outsider have little or no place in the triangular relation between government, employers and labour organisations.

As between the conflicting economic and social interests, the Government attempts to maintain a precarious balance, trying to recognise the *status quo* without shifting the pre-war balance too much one way or another. But the experience of other countries (e.g. Germany, France and Italy) as well as the inherent logic of the development traced in this article, seems to show that such balance cannot be indefinitely maintained. Sooner or later a stalemate is reached which leads to an active government policy. The principal alternatives seem to be the socialist or the fascist way.

W. FRIEDMANN.

RECENT DEVELOPMENTS IN SOVIET LEGAL THEORY

I

DURING the 'thirties Soviet ideology clearly developed in the direction of accepting the State as the organisation of Socialist Society, an organisation which, if not ultimate, is in any case regarded as definitive for any period admitting of human estimation. This development could not fail decisively to change the outlook of Soviet legal theory. Following the lines of classical Marxian thought, Soviet legal theory had originally looked upon State and Law as superstructures essentially based upon the foundations of bourgeois society and to be used by a proletarian dictatorship only for a relatively short transitional period. Nearly all studies of Soviet legal theories published outside the Soviet Union[1] have been

[1] The only exceptions, apart from some American publications not now available in this country, are the present writer's report in *Zeitschrift fuer Sozialforschung*, Vol. VII (1938), No. 3, and (for the special problems of International Law) Hazard's article in *The American Journal of International Law*, Vol. 32 (1938), pp. 244 *ff*. None of these publications, of course, has touched the most recent developments, for which I must refer to the official Soviet legal organ,

exclusively concerned with developments during this first phase, i.e. in fact during the first fifteen years following the end of the Civil War. The subsequent events have not only been neglected by Western observers, but their analysis has even been declared to be "uninteresting" by writers who paid more attention to the external circumstances of the "purges" than to the fundamental issues which were involved in that great political crisis.[2] In fact, the most interesting problem of Soviet legal development, viz. the problem of a specific theory of Socialist Law, arises just at the point where the need for such a theory is recognised in principle. There could be no such recognition as long as law was regarded as a mere "bourgeois fetish," bound to "wither away" as a consequence of the success of collectivism.[3]

This latter attitude merely expressed the revolutionaries' natural opposition to the law of the former state. But this opposition was reinforced by the original Marxian conception,[4] according to which not only the political organisation inherited from the former rulers, but the State in general, was to be used by successful revolutionary socialists only for a transitional period, a period the duration of which would be short if measured by the standards of history, and during which, as in all revolutions, little attention was likely to be paid to legality. In some of Lenin's papers[5] "proletarian dictatorship" is indeed given the meaning which is often associated with the word "dictatorship," namely that of a "rule not bound by fixed legal norms." But, even during the Civil War, it was only very exceptional that Lenin used definitions of this kind. As a rule, he based his case for proletarian dictatorship, as opposed to the allegedly "classless" bourgeois democracy, on the Marxian doctrine that every state means the domination by one class, and that, consequently, the only choice confronting the working-classes was that between a state dominated by themselves and a state dominated by the old ruling class. At the same time, however, Lenin demanded in all the writings published during that period that there should be "revolutionary legality," i.e. a properly functioning Soviet State. This was sociologically analysed as the rule of the working classes, but this rule was to be exercised according to clearly established legal norms, so that the question as to what was right or wrong from the point of view of the interests of the working class should not be

Sovietskoe Gossudarstvo ("The Soviet State") (abbreviated in this article with *S.G.*). Dobrin's article in *The Law Quarterly Review*, Vol. 52 (1936), is written without knowledge of the—then just beginning—crisis of the Pashukanis school, but with an interesting analysis of the reasons that led to this crisis. Virtually all other publications (including the monograph by Taracouczio on Soviet Conceptions of International Law and the article by Makarov in *Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht*, 1936, pp. 479 *ff.*) deal with stages of the development within the first period.

[2] See Florin-Hertz, "Bolshevist and National Socialist Doctrines of International Law," in *Social Research* (New York), Vol. 7, p. 18. It is unnecessary to discuss the question whether there is in any country such a thing as a pure "inquiry for inquiry's sake" concerning a problem of such high political importance as legal theory. It may be taken for granted that the participants in Russian legal discussions were subject to any degree of political bias, but I venture to think that it is more interesting to look for the ideological expression of the issues people were each other "purging" for than for the paraphernalia of the purges.

[3] Reichberg in a publication of 1919—but similarly Stouchka as late as 1931.

[4] In the *Critique of the Gotha Programme* (1875).

[5] Especially in a draft on "Proletarian Dictatorship," written in connection with international Socialist discussions in 1920 and published in Vol. XXV of the (Russian) complete collection of his works.

left to the hazard of the application of these norms by the subordinate organs of the state according to their own estimation and judgment of working-class interests. This theory was generally adopted by Soviet political doctrine—as no state of any kind can work without some sort of a theory of "legality"—but it left little scope for the development of elaborate legal theories as long as "revolutionary legality" was in a highly provisional stage, and considered as being subject, as soon as possible, to replacement by a regime of free and voluntary subordination in a communist society.

The need to interpret Soviet Law as something much more permanent, and to reconcile its relative stability with the tenets of Marxism, arose only after the introduction of the N.E.P. (New Economic Policy), i.e. the temporary compromise between the Soviet regime and the still surviving capitalist elements in Soviet society. The theory of Pashukanis which—especially outside the U.S.S.R.—has often been wrongly described as *the* Soviet theory of Law, can be characterised as the legal theory of the N.E.P. Pashukanis reduced the general legal theory of Marxism (which is in itself colourless and goes hardly beyond the statement that all legal systems are conditioned by whatever social systems they are called upon to protect) to an explanation of Law in general by one particular economic category, viz. that of the exchange of commodities. According to Pashukanis,[6] "every general theory of Law" is "a description of the relations of persons who act in the market as commodity-dealers—a description from one particular point of view which disregards all concrete circumstances." The commodity dealers are protected by the law in their relation to the commodities in which they deal. They themselves must have mutually recognised their property in those commodities, before their extra-juridical relation of exchangers (as distinguished e.g. from that of robbers) of commodities can find legal recognition.[7]

It is not difficult to understand why it was that a theory of this kind was formulated just in Russia, a country in which the origin of the State was probably bound up with the raids of armed merchants and slave dealers.[8] Nor is it hard to see why it grew up during the period of the N.E.P., when the existing legal system was bound to appear to a Marxian as a compromise the proletarian state was compelled to make with the still unconquered forces of private trade. The interesting point[9] in the whole conception is the attempt to explain Law independently from that agency which classical Continental, including Marxian, sociology regards as its *fons et origo*, i.e. the State. In this direction Pashukanis simply accepts the views of German conservative philosophers[10] on the theoretical omnipotence of the State and on the impossibility of giving a legal explanation of the State which "as an organ for class-domination, or as an organisation for war, neither requires, nor admits of, legal interpretation."[11] Law is an institution distinct from, or rather opposed to, State regulation.

[6] *The General Theory of Law and Marxism*, 3rd (Russ.) ed., p. 10.

[7] *Ibid.*, p. 78.

[8] This theory has been, and still is, somewhat controversial in Russian historical thought—but for our purposes it is sufficient to say that this theory was and is accepted by a very large sector of Russian scientific thought.

[9] Emphasised by Dobrin, *l.c.* In the U.S.S.R. the point, of course, formed a central object of the attacks against Pashukanis's theories by Stoutchka, and, later, by Bratusz (*S.G.*, 1937/1–2) and others.

[10] See for details Dobrin, *l.c.*

[11] Pashukanis, *l.c.* p. 92.

Law, including even public law, is a mere reflection of the specific relation which subsists between the free and equal dealers in commodities. "The legal order differs from any other social order exactly for this reason that it is designed for private separate subjects."[12] And only "when the whole economic life is based on the principle of the free agreement of wills, then every social function obtains a legal characteristic in some way or another."[13] If this was true, there could, of course, by definition be no Socialist Law at all. "The withering away of the categories of Bourgeois Law" does not imply their replacement "by some new categories of Proletarian Law," but "the withering away of Law in general, that is to say, the gradual disappearance of Law from human relations."[14]

Now, such an interpretation of Law might have had various political implications, once the N.E.P. came to an end, and the State proceeded to the elimination of private enterprise and to an attempt to organise the whole of economic life. Pashukanis's theory was capable of being interpreted in the chiliastic sense of original Communism, i.e. in the sense that the "withering away" of all remainders of the bourgeois order was near, and that compulsion as the main agency of social organisation was going to be replaced by a free community based upon the voluntary submission by the minority to the decisions of the majority. Thus the Law, which Pashukanis's theory visualised as something independent from the State as such might "wither away" long before—owing to the obvious necessities created by international conditions—the State could be expected to disappear, provided only that the State could get rid of Nepman and kulak, as, in the event, it undoubtedly did. Even a critic of Pashukanis like Stoutchka wrote that with the final victory of Socialism the Civil Code of the U.S.S.R. could be broken to pieces "in a similar way as we have broken the bourgeois state by the October Revolution."

However, Pashukanis's theory was also open to an interpretation in the opposite sense, as "a warning against Socialism, . . . and a hymn to Capitalism, especially the petty-bourgeois Capitalism—with its free exchange of commodities, equality, and the blessing of the Law."[15] This interpretation—the only natural one from the Nepman's point of view—which undoubtedly originated in certain German conservative theories of state-absolutism—would have coincided to a remarkable degree with those contemporary right-wing American theories which argue from a Liberal point of view against Socialism as a system "incompatible with the rule of Law." However interpreted, Pashukanis's theory was unable to provide a foundation for what was to come: for a state, i.e. a strictly organised legal organisation, with a completely socialised economic system such as the Soviets were on the point of building up.

Quite apart from the possibility of a counter-revolutionary interpretation pure and simple, it was out of the question for the Soviet Government to tolerate a theory which involved the tendency to let the State "wither away"—with a hostile world all around. Such tendencies, however, were encouraged up to a point by the legal theories which were in vogue in the Soviet Union at the end of the 'twenties, and produced results much more serious than the discussions among students—mentioned by Dobrin—whether it was worth while to continue studying law. Thus some

[12] *Ibid.*, p. 59.
[13] *Ibid.*, p. 62.
[14] *Ibid.*, p. 23.
[15] Dobrin, *l.c.* p. 423.

attempts were indeed made to abolish the local political organisation, i.e. the Village Soviet, and to put in its place the Kollkhos, the economic co-operative, as soon as all the local peasants were included in the latter. Prior to 1934, Pashukanis himself denied that the transformation of the economic system could be achieved through legal methods—to him Law was and remained something fundamentally opposed to the Socialist revolution.[16] He admitted that the rule of Bourgeois Law had come to an end in the sphere of production, but, even now, he argued that the essence of the new legal order was to be found in that part of the social organisation which preserved the fundamental traits of bourgeois society, the application of standards of formal equality to men unequal in fact, i.e. chiefly in the sphere of distribution. This analysis of Bourgeois Law is in line with classical Marxism,[17] but to treat it as the essential feature of existing Soviet society meant to invite the reproach of Trotskyite propaganda which was found in the denial of the Socialist character of the Soviet State such as it had developed in actual reality. Dozenko, a pupil of Pashukanis, tried[18] to avoid this consequence by maintaining that the Soviet State was using the forms of Bourgeois Law in order to remove its social content. A new system of Law was evidently developing in spite of the fact that the abolition of private commodity production was proceeding rapidly. Dozenko, therefore, proposed to substitute for the defunct "commodity exchange conception" of the Law a new one, to be based upon the central institution of Socialist property in the means of production, and to derive from this the legal principle of the distribution of the social product in accordance with the work performed by the individual. It was Dozenko who criticised the theories of Pashukanis as well as those of his antagonist Stoutchka on the ground that they tried to understand Law as an automatic reflection of given economic facts rather than as an instrument used by the Soviet State with the object of transforming the existing economic relations.

The "self-criticism" of the Pashukanis school had begun in 1930, when the "commodity-exchange conception" of Law and the theory of the "immediate withering away" of State and Law had been dropped, but it reached its logical conclusions in the new theory of Dozenko. Subsequently in the heat of the political struggle, when Pashukanis as well as Dozenko had been "purged" for purely political reasons, their theoretical antagonists[19] drove their criticism far beyond what was necessary in order to attack the position which the members of the hostile school had been forced to defend in their last articles published in 1936. They now went to the length of denouncing the mere supposition that Soviet Law was using the outward form of bourgeois legal institutions (even though for totally different purposes), or even that it had done so during the N.E.P. period.[20] This assumption was attacked on the ground that it implied either the tacit acceptance of the possibility of a peaceful "growing of Capitalism (or capitalist Law) into Socialism" or a denial of the socialist character of the present Soviet Law. Both these consequences were said to be avoidable only if form and substance of any given law were regarded

[16] For details see the writer's above-mentioned article in *Zeitschrift fuer Sozialforschung*.
[17] Of the *Critique of the Gotha Programme*.
[18] In *S.G.*, 1936/3.
[19] Bratusz and Vyshinsky, *l.c.*
[20] As Krylenko had assumed. See *Zeitschrift f. Zozialforschung*, *l.c.* p. 398.

as totally inseparable. These discussions were of a rather formalistic and scholastic nature: their only real content was the rejection of the Trotskyite interpretation of the present Soviet society as "state-capitalism." This interpretation was supported by a view which regarded Law (or at least certain legal institutions which the Soviet system could not afford to give up) as in themselves essentially capitalistic. At the same time there was the danger that individual ownership in means of consumption might fail to fulfil the function of serving as a main incentive to increased participation in social production—a function expressly allotted to it by Soviet policy—if it was treated on a par with private ownership in means of production, a sociologically entirely different institution the rapid abolition of which every Socialist was bound to desire.[21] For all these reasons the theories of the Pashukanis school had to be eliminated, quite apart from the fact that, for reasons probably not quite unconnected with their theoretical views, some of the representatives of the "school" had taken up a political attitude which resulted in their being "purged," an event which, in turn, produced a number of exaggerations in the theoretical campaign against their writings. This elimination of the theories of the Pashukanis school, however, was a purely negative fact. It marks the point at which the real problems of Soviet jurisprudence began to emerge.

For the State wanted more than a—from its own point of view—acceptable interpretation of the function to be allotted to the individual. What the Soviet system stood in need of, even more urgently, was a legal system governing with binding force the functioning of the novel element in Soviet society, viz. the system of state-planned economy. One of the almost unavoidable by-products of the bygone reduction of Law to a system of norms concerning the individual citizen (whether as a producer of commodities, or, as later understood, as a receiver and owner of a section of the national consumption fund), had been the total neglect of the legal and binding character of the rules governing the economic activities of the State. To say the least, these former theories, even as modified in the course of the various self-criticisms of the Pashukanis school, implied the "withering away" if not of Law in general, then at least of Civil Law. Yet Civil Law is, as we hope to show, one of the main instruments used by the Soviet State for the purpose of regulating socialised production. Given the abolition of capitalist production, pre-1937 Soviet legal theory left open only one of three possible legal interpretations of what was happening in the socialised sector: Either there was no Law at all in this part of economic life (apart from the legal principles regulating the labour contract)[23]—or there was merely a system of "plan-contracts" between the organs of Socialist economy, which, in contradistinction to the "civil-law contracts[22] between private undertakings, had only morally, but no legally binding force[23]—or, finally, "Economic Law" was a mere description of existing economic relations without any normative and binding character.[24] Having dropped the "commodity exchange conception" of the Law, the State needed a new and positive theory, especially of Civil Law, which would assist in interpreting the application of Civil Law to socialised economic relations.

[21] See Bratusz, *l.c.*, quoted in *Zeitschrift*, p. 399.
[22] Liebermann, *S.G.*, 1930/8.
[23] Amfiteatrov in 1932.
[24] See, for all these theories, *Zeitschrift f. Sozialforschung*, *l.c.* pp. 397/9.

II

The problem which confronted Soviet legal theory was—and still is—how to find a common denominator for what are essentially two different sets of social relations. For historical and practical reasons these two types of social relations are subjected to one system of legal norms, known as "Civil Law." But whatever conformity there appears to be between them is purely illusionary in any legal or social system, while in the face of the realities of life in the Soviet Union the existence of this conformity can not even be pretended. The identity between the "private property" attributed to the owner, e.g. of the furniture of the family-home, and that enjoyed e.g. by a shareholder in a big joint-stock company is, of course, highly problematical, but it constitutes one of the essential foundations of the legal ideology of every capitalist society. In the legal ideology of the Soviet Union, no vestige has remained of this identification of the two different kinds of property, and, whatever there may have been in the nature of such an identification in the past, vanished when the private economic sphere of the peasant kollkhos-member was reduced to a mere "auxiliary private husbandry," i.e. a home-garden and a cow. Control of the means of production is strictly reserved to the State and the State-controlled co-operatives, while the individual receives a part of the social product graded "according to quantity and quality of labour," as a reward for his or her participation in socialised production. Of this claim it can probably be said that it enjoys a larger amount of security at the present stage of Soviet development than it did during the N.E.P., i.e. at a time when the notion of private property involved the possible appropriation of parts of the national capital by individual citizens acting in competition with State-controlled undertakings. Whilst the State was vitally concerned in preventing the rise of the kulak, it is not all interested in imposing restrictions upon what is one of the principal stimuli fostering the productive efforts of a tractorist who is a member of a collective farm. Having been segregated from that other kind of private property which the Soviet State has successfully striven to abolish, the existing "private property" has attained a much higher degree of stability in the only field in which it has been permitted to survive, i.e. with regard to means of consumption. But though this legal institution—-private property – has gained in stability, its weight in the balance of social life has clearly diminished. The theoretical difficulty arises from the fact that this very real shifting of emphasis continues to be veiled by the formal use of one identical terminology for the description of two totally different sets of factual situations.

Present Soviet legal doctrine[25] defines property as "the right to appropriate the natural opportunity for production and the products of labour." Clearly this right belongs to the State, exclusively with regard to the first branch of the definition, and primarily with regard to the second. The administrative bodies—autonomous trusts and factories—through which the State manages its property, are only executive organs which cannot operate except on behalf of the State. Consequently the most important economic relations, i.e. the mutual intercourse between the big units of production, transport, and commerce, are transactions into which the State enters with itself. When iron ore is transferred from the mine to the steelworks, or cloth from the mill to the store, this is not a transfer of property, but only an assignment of the right and of the duty to administer

[25] E.g. Benediktov in *S.G.*, 1940/5–6, and Bratusz in 1940/11.

these goods on behalf of the owner and in accordance with his instructions. Yet the State finds it expedient to let its various agents deal with one another *as if* they were "owners." This fiction is conducive to the more efficient management of the State property in that it facilitates the operation of the price-mechanism, the so-called "control by the rouble." The iron ore or the cloth is sold by one State-agent to the other under a contract the performance of which may be—and frequently is—enforced through the mechanism of a Civil Law suit and of civil execution by the judicial organs of the State. The State, of course, gives judgment and issues execution in favour of itself and against itself, and cannot do otherwise, whatever be the concrete outcome of the case. It is true that, up to a point, the managers and employees of a given State-owned undertaking are personally interested in a maximum amount of economic[26] results of their own efforts.[27] Thus, the decision in a civil case may not only determine the right and duty to administer a given part of the State property, but may also bear upon the personal material situation of the employees of the winning as well as the losing side. But this is only a by-product of the decision. The manager and workers of a factory may benefit if "their" factory is successful in claiming the right to administer some given part of the national property, but they are, and remain, mere employees. It is not they who win the case, although the common employer of the plaintiff and of the defendant may find it highly expedient to reward those who most successfully administer his property. They are not, as individuals, the subjects of those rights and duties for which they fight in Court as representatives of a given undertaking, but they are the subjects of those rights which, as employees, they seek to enforce against that undertaking, such as the right to wages. Nevertheless, for reasons of expediency, these various legal conflicts are subject to one set of rules called, according to usage, "Civil Law," on the assumption—fictitious in most and in by far the most important cases—that what is at stake are in each case private rights arising from property and contract. It would be highly inconvenient to make a fundamental legal distinction between, e.g., the liability of the mill to the store and that of the store to the individual purchaser, or, even more so, between the liability of the same mill to a State-owned retail store and to a co-operative retail store. But, quite apart from this, the State finds it advisable to delegate to an authority which is totally unconnected with, and in no way responsible for, the staff of the undertakings which are parties to the case, i.e. to a Court, the decision upon the merits of a contest which involves the question how far both plaintiff and defendant have fulfilled their obligations towards their common principal.

From the point of view of Soviet legal theory a further difficulty arises from another source. We have seen that the Soviet State is concerned with

[26] We are here concerned with the worker's interest in the economic efficiency of his factory, etc., i.e. with his pecuniary interest in increased factory profits on the basis of an improved annual balance sheet. This must be distinguished from his interest in increased production. His earnings may increase as a consequence of improvements of his technical efficiency, but, as far as factory profits are concerned, the individual worker's effort is only one amongst many factors influencing the result.

[27] The most important of these incentives is the so-called "Directors' Fund," into which the State pays half of those surplus-earnings of any State-owned enterprise which exceed the plan. This must be spent by the management partly for rewards for particularly efficient employees, and partly for the general needs of the employees, especially for the improvement of their housing conditions (at least half the Fund must be spent in the latter way).

two different types of social and legal relations —those between itself and its citizens and between those citizens on the one side, and those between its own organs on the other—and that both are comprised in the term "Civil Law." For the second type of relations, however, the State requires a concurrent body of norms, those of Administrative Law. The need for this is evident: The price mechanism, the "control by the rouble," can only serve as an indicator showing the efficiency or otherwise of the various managements. Taken by itself, it is unable to draw the consequences from shortcomings which it has indicated, nor can it be of assistance in enforcing the remedies destined to overcome deficiencies in management, since the State cannot permit one of its own organs to attach the "property" of another beyond what is necessary for the enforcement of the performance of a given contract. In some cases[28] the State goes to the length of withholding credits granted to an undertaking which has failed to fulfil its duties, or to attach its accounts, or even to stop the further supply of raw materials of the economic use of which the State has not been convinced—not to speak of the normal methods of enforcing reforms in the internal organisation and management of an unsuccessful factory. But the question whether or not measures of this kind should be taken is reserved by the State to its own higher economic organs. And, quite apart from those cases which correspond to what in a capitalist system would be called bankruptcy or compulsory liquidation, the State reserves for itself the right to abolish (as well as to create) economic units and to redistribute their capitals, accumulated profits, profit expectations, etc.[29] At the same time it is an established principle that the State is interested in keeping a check on the economic efficiency of its undertakings "by the rouble," i.e. through the mechanism of the Civil Law. It has, therefore, been a matter of permanent legislative and administrative practice to provide for the safeguarding of "private rights" against undertakings to be liquidated in the course of an administrative reorganisation, though Soviet Civil Law gives no *legal* guarantee for "rights" "vested" in one State-owned unit as against another unit subject to liquidation—in contradistinction to rights of individual citizens which enjoy legal protection even in this case.[30] It is not difficult to define the difference between the technique of Soviet Administrative Law and that of Soviet Civil Law: the first operates through the mechanism of subordination, the second between co-ordinated and formally equal parties. Nor is it difficult to determine who are the "persons" subject to the former and to the latter,[31] or what are the various remedies available in either type of case. But the difficulty of explaining the concept of Civil Law relationships subsisting between various trustees or agents of one identical owner and principal are increased by the simultaneous existence of another body of rules providing for the redistribution of the property administered between these same trustees or agents, a body of rules which is entirely unconnected with their Civil Law relationship. This difficulty is further accentuated by the necessity of giving a certain degree of stability to "Civil Law Relations" in order

[28] A. Benediktov, "The Organs of Administration of Socialist State Property," in *S.G.*, 1940/5–6, p. 40, with detailed literature on facts.

[29] Benediktov, *l.c.* p. 38.

[30] *Ibid.*

[31] In order to acquire *locus standi* in Administrative Law, a body or organisation requires a much smaller degree of autonomy than in order to be the bearer of rights and liabilitites in Civil Law.

to grant to the individual citizen a measure of security of earning the reward for his participation in national production and thus to preserve the main stimulus for the latter.

Having abandoned Pashukanis's "commodity exchange conception" of Law, Soviet jurisprudence has not so far succeeded in developing a generally accepted definition of Civil Law. During the last few years which preceded the outbreak of the present war, five distinct conceptions have been formulated which we propose briefly to analyse.[32]

1. The textbook by Mikolenko, published in 1938, contains a purely formal definition. Civil Law is defined by the method used for the enforcement of civil rights, i.e. it comprises all those rights which are enforceable by the specific remedies of civil procedure, rights which are based on the formal equality of the parties entering into legal relations in the form of a contract. On the other hand, there is in the same book a definition of Civil Law as the body of those laws which deal with "Civil Society" in the Hegelian sense. This second definition is, in a Socialist society, a mere tautology. Where the State takes upon itself the regulation of economic as well as political life, "Civil Society" can have no positive meaning at all, and simply connotes the entirety of those social relations which the State does not subject to Public Law. If, however, "Civil Society" is intended to signify "Economic basic structure" in the Marxist sense (which is the only concrete meaning the term can bear in a socialist economy), then Mikolenko's second definition includes the whole structure of economic regulations, even those which belong to Administrative Law,[33] and excludes important parts of Soviet Civil Law such as Family Law. Mikolenko failed to see that his second, substantial definition led to consequences such as these, and also that it cuts right across the first, formal definition.

2. Genkin[34] defines Civil Law as the law governing the circulation of property rights. Administrative Law is that body of norms under which the State creates the conditions preliminary to those transactions through the mechanism of which property circulates between the various State agencies and the citizens, transactions which are the subject-matter of Civil Law.[35] It is easy to see the analogy between this definition and the "commodity exchange conception,"[36] an analogy without any real significance as long as Civil Law is not considered as the only real, or at least fundamental, body of laws (this had been Pashukanis's thesis). Genkin's attempt to circumscribe the traditional sphere of Civil Law by an economic definition is, however, open to much graver objections. It does not cover the ground. Family rights, e.g. payment of maintenance, and delictual rights, e.g. payment of damages for bodily injury, are also included in Soviet Civil Law. How can it be said that they have anything to do with the circulation of property?

3. Kechekian[37] uses for his definition of Civil Law the distinction between two different methods of giving effect to the public interest which, as he clearly sees, forms the real guarantee behind Civil as well as

[32] See Amfiteatrov, "On the Conception of Soviet Civil Law," in *S.G.*, 1940/11.
[33] See Bratusz in *S.G.*, 1940/1, p. 40.
[34] In *S.G.*, 1939/4.
[35] See Bratusz, *l.c.* pp. 50 ff.
[36] Amfiteatrov, *l.c.* p. 92.
[37] In a lecture in the Juridical Institute of the U.S.S.R., June 25, 1940.

behind Administrative Law. Every state, he says, must regulate social relations in two ways, in a "centralist" way, i.e. "from above," through the machinery of Public Law, and through the agency of the initiative and autonomous activity of individuals and collective units entering into legal relations which form the body of Civil Law. This includes the citizen's right to be remunerated for his participation in social production and the legal guarantees which safeguard his right to use, and dispose of, that part of the fund for consumption which is allotted to him as a reward for his efforts. But the definition also covers the civil relations between State undertakings, by laying emphasis on their initiative in the realisation of their mutual rights and liabilities, in contradistinction to the initiative of the supervising national organs. The definition fails to take account of the fact that the mechanism of Administrative Law may also be set in motion, and thus safeguarded, by the initiative of the citizen who has a grievance. Otherwise there could be no subjective rights in the sphere of Public Law at all.

4. Bratusz[38] tries to overcome this difficulty. Like Kechekian, he considers autonomy as the basis of Civil Law. But he defines it as the "legal form of giving effect to, and safeguarding, personal interests." The citizen who claims his suffrage and the official who decides a case represent a public, transpersonal, interest but—and this is the objection to Bratusz's view—so does the manager of a State undertaking who raises a claim against another State undertaking. Bratusz[39] argues that, in the U.S.S.R., the social interest, though identified with that of the socialist State, is partly enforced by being linked with the autonomous action of the private interests which are protected by Civil Law. Since all private interests are considered by the State to have equal weight, the State introduces a second characteristic of Civil Law, i.e. the equality of the parties. The most important civil relations in the U.S.S.R., i.e. those between public undertakings, are, according to Bratusz, only analogous to genuine, i.e. inter-individual Civil Law relationships. The analogy arises from practical political necessity which compels the State to base the "control by the rouble" on the personal initiative of the individual managements. Thus traditional, but much less important, phenomena—genuinely private property and contract—form the substance of the definition, and the legal interpretation of the more recent, but far more significant, phenomenon—socialist State enterprise—depends on that of the traditional phenomenon.

5. Amfiteatrov[40] meets this objection by defining Civil Law as the regulation of property relations on the basis of the socialist property in the means of production. The inevitable and admitted[41] consequence is that the definition of Civil Law covers the whole of the administrative regulation of economic life—a body of laws far more weighty than those governing the suits between citizens. There are few legal norms in the U.S.S.R. which are not somehow connected with socialist property, so that Amfiteatrov's definition is practically an identification of Soviet Civil Law with Soviet Law in general, a denial of the specific character of Civil Law.

[38] In *S.G.*, 1940/1, pp. 36 ff.
[39] *Ibid.*, pp. 42/3.
[40] *L.c.* pp. 94 ff.
[41] This consequence has been quite consciously accepted by Amfiteatrov (*l.c.* p. 97).

It is highly doubtful whether Civil Law can be defined at all on the basis of the reality of present Soviet life. Shortly after Soviet lawyers had abandoned Pashukanis's views, it was said[42] that, henceforth, the institution of socialist property in means of production would have to be the only foundation of Soviet law. Amfiteatrov's contribution is, then, hardly original. It may be logical, but it does not deal with *Civil* Law as such, while definitions like those of Bratusz, which pay closer attention to the specific features of Civil Law, fail to take account of the essential phenomena of present Soviet legal life and treat them as an annex of peripheral institutions. Pashukanis was wrong when he based his definition of Law in general on the exchange of commodities—but he would have been right —or nearly so—if he had confined his analysis to Civil Law and if he had said that Civil Law is the central category of a capitalist legal system. If a socialist society abandons the traditional legal conceptions inherent in a different social structure, that does not mean that it has no law. Public Law can, in a democratic system, secure subjective rights, including individual rights as far as they can be admitted by a socialist society, to at least the same extent as formally equal rights as between factually unequal individuals can be guaranteed by the traditional Civil Law of a capitalist society.

In her present stage of development, the U.S.S.R. rightly rejects a theory which, like that of Pashukanis, attempts to measure her legal system by bourgeois standards. The difficulty arises from the fact that, for reasons of expediency, the traditional Civil Law categories are used with the object of securing the efficient working of a type of social mechanism vastly different from that successfully served by the historical Civil Law. The view that there is a public interest in preserving the outward form of Civil Law, i.e. the legally safeguarded spontaneous action of the interested individual, is likely to come to stay, perhaps for generations, at least as far as the individual's right to remuneration is concerned and possibly also in connection with those non-economic rights (e.g. in matrimonial law) the predominantly personal character of which is evident. It is less certain whether the public interest will continue to demand that the efficient management of the various departments of the national economic system—and the Soviet "enterprises" are nothing else—should be controlled "by the rouble" in the form of the traditional Civil Law contract between fictitious parties. But even the policy of preserving these "rights" is perhaps much more stable than that of protecting the remnants of private property in means of production.[43] The latter example shows that it is no longer Civil Law as such that enjoys any degree of stability in the U.S.S.R. What is permanent or semi-permanent is only the use made of Civil Law conceptions in order to formulate, where it is convenient to do so, types of social relation for which an adequate legal terminology has still to be found. As long as this has not been achieved—and a problem of this magnitude is not likely to be solved within the life-time of one generation—Soviet lawyers are perhaps well advised to give up the idea that Civil Law is a special department of Law opposed to others. They might then concentrate upon a discussion of the traditional conceptions of property, contract, civil procedure, etc., as one of various techniques for the protection of rights—rights which either correspond to predominantly individual interests

[42] See above, note [18] (Dozenko).

[43] I.e. that of the few still existing individual (as distinct from kollkhos-members) peasants. See Amfiteatrov, *l.c.* p. 100.

(matrimonial law, wage claims)[44] or which have been created in order to enable the State to control the efficiency of management by co-ordination rather than by sub-ordination. If "Civil Law" was treated as one technique among others, the theoretical development of those other methods would be stimulated, and Civil Law itself might attain that degree of stability that is inherent in the traditional forms which may have largely lost their real background.

For a number of years — and this is an important point—Soviet legal theory has become conscious of the necessity of establishing a stable and objective, i.e. a genuinely legal, basis for the new society. This tendency must be contrasted with the relativist philosophy which inspired the first post-revolutionary period. As early as 1937 the relativist conception of Criminal Law contended for by the Pashukanis school and by Krylenko was criticised by Vyshinski.[45] This referred in particular to the attempt at eliminating the idea of "guilt" and all that it involves from Soviet Criminal Law, and at replacing it by the theory that the Criminal Law merely protects society and its transient and changing interests. It is highly interesting that the removal of legal safeguards, particularly of the principle *nulla poena sine lege* in the Fascist countries continued to be criticised in the Soviet Union even during a period when Soviet foreign policy was not especially prone to encourage harsh attacks on Fascist institutions.[46] Soviet legal ideas are evidently not orientated towards arbitrary State rule as an ideal, however hard it may be to find a workable equilibrium between the rights of the *individuum* and those of a centralised society confronted with the problems of preparation for war and of actual warfare under the most difficult conditions which can be imagined.

III

The development of the Soviet conception of International Law is of interest from the point of view of the post-war international order. In one sense this is the least, in another it is the most complicated problem of Soviet legal theory. Here the difficulties are not restricted to the Soviet system, but, as we hope to show, Soviet legal theory has the merit of expressing very frankly the problems international lawyers have to tackle in every country. The matter is comparatively simple, because, in contrast to Soviet internal law, the factual relations which form the subject-matter of the legal system have not changed under the eyes of the legal observers. Since 1917 the essential question confronting Soviet International Law has remained the same: How can a system of International Law, connecting opposite internal social systems, be explained within the framework of Marxist theory which derives legal relations from their social substratum? It is the attempt to answer this question which lends additional interest

[44] The factual substratum of these rights constitutes a combination of social and individual interests, but, in the very nature of things, the latter element predominates. It is different, e.g. with regard to the Directors' Fund, which might be abolished any day provided the Soviet Government found another way of equally stimulating the initiative of its employees.

[45] In a paper read May 3, 1937, see *S.G.*, 1937/3–4. See *Zeitschrift fuer Sozialforschung*, *l.c.* p. 400.

[46] See K. Polak. The theory of the essence of crime in bourgeois criminalist literature. *S.G.*, 1940/12. To read Russian scientific periodicals during the period of the so-called "collaboration with the Nazis" had often been a very useful experience for most of those who were engaged in discussions about the "collaboration."

to the Soviet conception of International Law, since the co-ordination of different internal systems may be one of the major tasks of post-war International Law in more than one respect.

The original Soviet view of International Law had been that it was a compromise between antagonistic social systems.[47] Korovin, the first author to use this theory, stressed the compromise character of the "International Law of the transitional period," particularly on the ground that to him Law was the expression of some existing community of ideology[48] and the State—as he put it by using an ultra-Marxian interpretation—identical with its ruling class. Thus, German-Soviet diplomatic relations appeared as a compromise—a compromise not only in the undeniable sense that the Germans accepted Russian socialism and the Russians German capitalism as deplorable but inescapable facts, but in the sense of a compromise between the Russian working-class and the German capitalist class as classes, not as states, on the basis of a measure of community of ideological standards. This theory was obviously the outcome of illusions cherished during the N.E.P. period by a part of the Russian intelligentsia, who believed in the possibility of a compromise between socialism and capitalism. The only remarkable thing is that this theory was able to survive for more than ten years before it was dropped.

This was done by Pashukanis in his textbook on International Law, published in 1935. The idea that the state, in its international relations, was to be identified with its ruling class was rejected as detrimental[49] to the international position of the U.S.S.R., and so was, on the other hand, Korovin's interpretation of Law as the form of expression of a community of ideology.[50] His "commodity exchange conception" of Law in general assisted Pashukanis in his attack on Korovin, because it postulated that Law was the corollary of an organised "society" and not that of a pre-existing "community."[51] Thus Pashukanis was able to show that International Law was essentially an instrument in the struggle between rival states, and, in our time, also between different economic and social systems represented by states. Opposite social systems can, therefore, avail themselves for their aims of "identical" forms of International Law. "The legal form embraces not only the mutual relations between capitalist states, or between them and the colonial world, but even relations affecting the struggle between the socialist and capitalist systems."

Both theories—the "compromise" as well as the "social struggle" theory—expressed two aspects of international relations which no observer of the facts can fail to perceive. Russians, equipped with some knowledge of Marxian dialectics and with the experience of the N.E.P. period, should

[47] In Korovin, *The International Law of the Transitional Period*, published 1925, and in Pashukanis's article on "International Law" in the *Soviet State and Law Encyclopaedia*, publ. 1926. For a short summary of Korovin's views in a Western language see his article in *Revue Générale du Droit International Public*, Vol. 1925, pp. 292 ff.

[48] *International Law of the Transitional Period*, p. 6.

[49] That Korovin's critics were right in this respect was amply proved by what happened to his own article in the *Revue Générale du Droit International Public*. The editor printed, immediately after Korovin's article, a reply by the Russian *émigré*, Mirkine-Guetzevitch, who pointed out that a state involved itself in contradictions if it claimed to be recognised as a state by others, but interpreted itself as a mere class-organisation engaged in a life-and-death struggle with the class-organisations constituted by the other States.

[50] *L.c.*, p. 87.

[51] See G. Schwarzenberger, *Power-Politics*, Chap. I.

not have found it difficult to understand a system of law which is a compromise and at the same time a field of struggle, and to see the advantages inherent in such a system from the progressive point of view. But, after 1936, legal discussions in Russia were dominated by the attack on Pashukanis's exchange conception of Law and against the various distinctions between bourgeois form and socialist substance which he was trying to draw in the course of his retreat from his original position when it had become untenable, an attack which, as we have seen, was justified as far as Soviet internal law was concerned. In the course of this attack, Pashukanis's theory of 1935,[52] i.e. the interpretation of International Law as an application of identical forms for different aims, was also criticised. At first this was done moderately; it was only said that certain forms of traditional International Law expressed purely imperialist policies and colonial exploitation and could not, on this ground, be applied by the U.S.S.R. At this stage Pashukanis was only accused of foisting upon the Soviet Union the whole traditional system of International Law without *beneficium inventarii*.[53] But subsequently one author[54] began to transpose the criticism of Pashukanis's Internal Law theories to the field of International Law. Failing to see the difference between the internal Soviet system after the abolition of the N.E.P. and the essentially "N.E.P.-like" international situation of the U.S.S.R., he went to the length of denying that there were any common forms of International Law at all. International treaties, which Pashukanis had regarded as instruments for the realisation of opposite social aims, mean, according to this author, something entirely different according as to whether they are used by an imperialist or by a socialist government which is constitutionally unable to conceive of any treaty other than a genuinely voluntary agreement. This theory, even more than that of Korovin, was obviously detrimental to the foreign policy of the U.S.S.R., in that it attempted to force upon her, not indeed the traditional system of International Law, but an adherence to standards of conduct towards her neighbours which, for reasons of her own security, she was quite unable to apply in the midst of a hostile world.[55]

Recently[56] the same author seems to have learned the lessons of Soviet policy during the initial stages of the Second World War. He now takes a point of view which is less extremist, and, therefore, much more easy to defend. "Socialist International Law" can only apply as between socialist states which, for one reason or other, prefer not to federate, and as between "bourgeois states of a particular type," like the Mongolian People's Republic, which, without being socialist, are laying the foundation for

[52] The previous theory of 1926 was of course, and quite logically, criticised along with that of Korovin and with the other conceptions of Pashukanis reflecting the spirit of the N.E.P. period.

[53] Jakovlev-Petrov in *Pravda*, April 27, 1937.

[54] Rappaport, in *S.G.*, 1937/1–2.

[55] For a review of these statements, see *Zeitschrift f. Sozialforschung, l.c.* pp. 401 ff. Even Jakovlev-Petrov enumerate among institutions of traditional International Law incapable of being applied by the U.S.S.R. not only those which progressive people everywhere would regard as clearly imperialist (Capitulations, International Settlements, etc.), but also a number of institutions which the U.S.S.R. did not only apply in 1939/41—owing perhaps to exceptional circumstances—but which she could hardly avoid in any post-war system of international security—such as, e.g. military garrisons outside her territory. Rappaport, in the above-mentioned article of 1937, went so far as to deny the validity of any treaty forced by pressure upon a weaker State.

[56] In *S.G.*, 1940/5–6.

future socialist reconstruction.[57] As between the U.S.S.R. and capitalist states, traditional International Law prevails—identically and with equal force for all partners—but, from the Soviet point of view, with the qualification that only the progressive elements of International Law which have been developed by progressive bourgeois Liberalism[58] can claim application. This postulates the recognition of the principle that all states are legally equal and politically independent—despite the admitted fact that states are virtually unequal and subject to economic exploitation by others, a fact of which the U.S.S.R. is obviously compelled to take account in her dealings with smaller and factually dependent states. In this connection the principle of national self-determination is recognised as one of the elements of progressive International Law, which is, however —like all these general principles—subordinate to the overriding interests of the Socialist revolution. Any concrete international question must be solved, not by applying general "formal principles," but by considering its merits from the point of view of the mutual relations of the forces involved.[59] This implies the denial of the binding validity of those general "formal principles," an implication which the author hardly avoids by his further statement that, whenever the application of the principle of self-determination would produce a favourable influence on the balance of power, it would find the strongest support of the U.S.S.R. Of course it would—as it would in the case of any other power likely to gain by its application. No doubt the U.S.S.R. will *in dubio*, i.e. where the enforcement of self-determination does not affect her own international power position, support any national claim, because she is thus likely to strengthen her ideological influence, especially on the smaller nations. But this is a political, not a legal argument. It is interesting to note that much emphasis is laid on the willingness of the Soviet Union to reduce, after the successful war of 1939–40, her claims against Finland to a mere demand for military security, and to forego any interference with the internal sovereignty of the Finnish State. Soviet legal theory might have been different if the Kuusinen experiment had had another result—but it showed its ability to draw the legal consequences of a given factual situation. Non-intervention is probably not the last word in Soviet legal ideology, but, given the internal stability of another state, the U.S.S.R. can be expected strictly to recognise the sovereignty of that state, and thus to reinforce her own ideological influence.

Western progressive interpreters of International Law have sometimes wondered why, from the very beginning,[60] the U.S.S.R. has stood up for that idea of sovereignty which such writers are inclined to regard as a relic of the past—to be thrown overboard as speedily as possible. For this there are clear and impressive reasons from the Soviet point of view: the abolition of sovereignty involves the dangers of foreign intervention against the internal social system of states which represent a different—and possibly a higher—order of society. This fear, or rather, from their point of view, this hope, is often enough quite clearly expressed by those who advocate a "radical" solution of the problem of international anarchy

[57] *L.c.* pp. 145/6.
[58] *Ibid.*, p. 142.
[59] The fact that this argument was used in an article published in spring 1940 is another proof that the "collaborationist" interpretation of the Soviet-Nazi relations was wrong.
[60] See the article by Korovin in the *Revue Générale*, pp. 296 ff.

by federation, etc.[61] To abolish sovereignty means to subject weaker states to a majority decision, and to replace their consent to international readjustments by a legal practice with universally binding force—possibly of the Munich pattern.[62] Whatever favours the U.S.S.R. may win or lose in intellectual circles of the West by its defence of the conception of sovereignty, she is probably right in regarding this attitude as beneficial—beneficial from the point of view of her own safety against certain capitalist types of "Federalism," and also in view of the sympathies of the big Asiatic and the smaller European nations which cherish sovereignty, if it was only in order to remain free to decide for the sake of what system they desire to waive their "sovereign" rights.

On the other hand, it is interesting that Soviet theory has never tried to find a radical solution of the question—highly problematic in any case—whether International Law is "really" law. Its interpretation has been much debated, its binding force has never been over-emphasised, but no attempt has been made to deny that it is binding. Quite to the contrary—we find in recent Soviet publications[63] sharp attacks on theories which deny the reality of International Law. Its reality is said to be based upon (1) the economic interdependence of the states, (2) the interweaving of their international relations, (3) the influence of public opinion. The first two elements seem to introduce a trend towards a balance-of-power system. As for the third, there is a distinct tendency to draw the line between "arbitrariness" and "law," not by using the norms of positive law, but in accordance with general conceptions of justice.[64] No Soviet author would admit that the latter originate in "Natural Law," but not one is prepared to adopt a strict positivism. One cannot help feeling that the theory of the boundary between Law and Morality has not yet been sufficiently worked out, an impression strengthened by statements to the effect that "injustice" is to be found not only in breaches of law, but also in the usual content of imperialist treaties. A clear statement that the U.S.S.R. recognises the reality of International Law, as one amongst many realities determining her policy, or even her conception of what her policy ought to be, would serve the same purpose and would favourably differ from what elsewhere is usually said on this delicate point.

In any case the usual attempts to find excuses, within the system of International Law, for breaking its rules, are strictly rejected. Early Soviet theory, including especially Pashukanis,[65] showed some sympathy with the *clausula rebus sic stantibus*, although there was hardly any need for the revolutionary government to invoke this theory in order to reject the payment of the Tsarist debts, some of which had been incurred in order to defeat the 1905 Revolution. In the Bessarabian case (by far the worst case of dismemberment of Russia after 1917), the Soviet kept to the line of non-recognition instead of waiting for the moment of revision and then using the *clausula* in order to support its claim.[66] Nevertheless, Soviet legal theory—as distinguished from diplomatic practice—did not abandon

[61] See e.g. Clyde Eagleton in *The New Commonwealth Quarterly*, Sept. 1939, p. 128.
[62] Rappaport, in *S.G.*, 1940/5–6, pp. 152/3.
[63] *Ibid.*, pp. 145/6.
[64] *Ibid.*, pp. 150 ff.
[65] Textbook, pp. 160 ff.
[66] It must, however, be stated that Western public opinion reacted to the re-annexation of Bessarabia much in the same manner in which it reacted to the other expansions of Soviet territorial power in 1939/40.

the *clausula* until the final liquidation of the Pashukanis school, i.e. until the usefulness of this weapon for Hitlerite aggression had become evident. This negative attitude towards the *clausula* prevailed during the period of the German-Soviet Non-aggression Pact,[67]—though invectives against the German Government became less frequent—despite the now clearly revisionist character of Soviet foreign policy.

It seems that International Law, according to Soviet views, can hardly be expected to exert a "moral" influence except in the direction of defending the *status quo*—a line adopted with conspicuous success by Litvinov's policy, between the time when Russia entered the League and that of the Munich catastrophe—or else in support of what are in effect anti-Soviet "changes" introduced by a still capitalist majority of members of the "Community of Nations." Confronted with this situation, the Soviet prefers to consider International Law as a safeguard for existing rights with the emphasis on the rights of those nations which have won their independence by national revolutions. In cases in which Soviet policy desires a change, it resorts to extra-legal arguments, like that in favour of self-determination, etc. It can hardly be doubted that, whatever additional Western sympathies the U.S.S.R. can hope to attract by the recourse to International Law arguments, is conditioned by a *status quo* policy on the part of the Soviet. On the other hand, its own people—and, probably, working-class opinion outside the U.S.S.R.—is much more likely to be impressed by "Natural Law" arguments in favour of whatever change may be desired. Consequently International Law as interpreted in U.S.S.R. strictly rejects all those devices by the use of which international lawyers outside the U.S.S.R. are trying to make the system more elastic, such as the abolition of the unanimity rule or the application of the *clausula rebus sic stantibus*. The element of elasticity is transferred by the Soviet from positive to what comes in fact quite close to Natural Law.[68] In this Soviet lawyers differ from lawyers elsewhere more in outspokenness than in fundamentals: in defending the most conservative interpretation of International Law, the revolutionary state probably only expresses the fact that International Law is obviously unable to cope with revolutionary changes.

This negative attitude differs strongly from the positive interpretation of Internal Law, an interpretation which manifested itself not only during the period of criticism directed against conventional legal thinking, but also in the first tentative efforts to find new methods of legal thought. Such efforts, it seems, presuppose a certain amount of homogeneity of the social substratum of the law, despite the fact that Soviet thought now admits that there will have to be a strong legal element in the new world order.

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[67] See Rappaport, *l.c.* (1940), pp. 152/3. Every revisionist claim made by one government to another involves a certain approach to the *clausula* unless it is coupled with an appeal to democratic or other moral principles of Natural Law. But it makes a great difference whether or not the *clausula* is considered to be part of Positive Law.

[68] Of course, no Soviet theorist would accept the term, but what matters to us is not some eighteenth-century interpretation of "Natural Law," or even quite generally the treatment of the latter as some eternal and permanent thing, but simply the fact that essentially moral values are opposed as a competing quasi-legal system to the positive one. There can be no doubt that recent Soviet ideology does so in many fields.

LAW REFORM AFTER THE WAR

PROF. KEETON has invited discussion of this subject in an interesting article which he contributed to the April issue of the *Law Quarterly Review*. I venture, therefore, as one who carried on a common law practice at the Bar until 1939 and who hopes to resume it after the war, to express a view upon an important aspect of the matter which is touched upon, but not developed, by Prof. Keeton. He remarks that before the war the "machinery of justice was . . . exceedingly costly and slow in operation"; so much so that "the superior Courts of Justice had practically ceased to be the tribunals of the ordinary citizen, or even of the citizen of some means." This is an appalling statement, which is nevertheless absolutely true.

Any fair-minded barrister or solicitor who was in regular practice between the two wars must admit that in five cases out of six it was not worth while to fight a disputed action for £250 in the High Court, or one for £40 in the County Court. To lose such an action might be disastrous for a man of modest means, and even to win was almost always uneconomic. An instance which came very recently to my notice is typical of many. The defendant was sued in the County Court for approximately £13, the last instalment of the price of a machine costing £400. Since the machine contained defective parts he refused to pay and counterclaimed damages for breach of warranty. His counterclaim was upheld and he was awarded £25 damages, against which the judge directed the £13 unpaid to be set off. He also directed the plaintiff to pay the defendant's costs of the claim and counterclaim. The defendant was thus left in effect with a judgment in his favour for £12 and the whole of his costs as between party and party against a plaintiff who, happily, was able to pay. The net result of this was to leave the defendant, when he had settled with his own solicitor, 30s. out of pocket. What it cost the plaintiff I do not know, but it can hardly have been less than £75. Over and over again I have seen results of this sort in County Court and High Court cases. It is as well for the legal profession that the published law reports contain so little information about the practical economics of the proceedings they record. Once in a while, however, the veil is lifted. See, for instance, *Kasler* v. *Slavouski* (1928, 1 K.B. 78). This case arose out of a sale of dyed rabbit skins, intended to be made up into collars for ladies' coats, from the defendant to the plaintiffs. The plaintiffs resold them to A, who resold them to B, who resold them to C, who attached them to a coat which he sold to Miss W, who contracted dermatitis through wearing it. Miss W brought an action against C in the Court of Session in Edinburgh, and was awarded £67 damages and her costs, which amounted to £248. C then made a claim against B for £643, being £315 (the amount of his liability to Miss W) plus £328, his own costs of the action. B paid this claim and issued a writ in the High Court for the same sum against A. A did not defend the action but paid £643 plus £21 costs and issued a writ against the plaintiffs for £654 (this may be a reporter's mistake for £664). The plaintiffs settled this action for £654 and £45 costs and claimed £600 damages from the defendant. They were awarded slightly less. It will be observed that the costs of both parties to the original action in Edinburgh amounted to nearly nine times the amount of the damages awarded, and one can say with confidence that the result would have been much the same if the action had been fought in London. I do not know whether the English

distinction between solicitor-and-client costs and party-and-party costs prevails to the same extent in Scotland. If it does, one can say with equal confidence that the difference between the two must have swallowed up practically the whole of the £67 awarded to Miss W. The costs of the final action in the King's Bench Division and the ultimate plight of the defendant are not of course revealed, but on the profit side the true picture would seem to be that the lawyers of two countries got a handsome percentage out of the proceedings, Miss W. got dermatitis, and no one else got anything.

But this is only one side of the matter. One of the items in a bill of costs is counsel's fees. It is not generally, nor even often, the largest one; but it exercises in practice a psychological influence of the first importance. Rightly or wrongly, the average litigant has got it into his head that the question whether he has got a good case or a bad one is of less importance than the question whether he has got a brilliant advocate or a mediocre one. Constantly I have heard litigants say, in effect: "Oh, yes, we had a very good case. We were advised that we were right. But the other side took in So-and-so, K.C. (naming a well-known advocate), to lead for them, and of course we never got a look in!" I have heard them say almost equally often that the other side merely *threatened* to take in So-and-so, K.C., and that therefore they threw their hands in and settled for what they could get.

Almost equally deterrent, and certainly as well-founded, is the fear of being taken to the Court of Appeal or the House of Lords. No honest practitioner can keep silent on this point. He must ask his client not only whether he can afford to lose his case if it goes wrong, but whether he can afford to win it if it goes right. I have many times had to advise clients in cases where only £200 or so was at stake, but where the opposition was wealthy and determined, (*a*) that I thought they had a good case, and (*b*) that in my opinion they would be wise to settle it as quickly as possible.

Finally, one should mention the high proportion of cases in which successful plaintiffs find themselves confronted at the end of long and stoutly contested litigation by defendants who turn out to be men of straw. That this happens so often is due in no small measure to the superb facilities for delay and obstruction afforded by the Rules of Court. There is a type of defendant, well known to all practitioners, who has no real defence but who "wants time." Any competent solicitor can get him three months or so merely by exploiting the courtesy and attention of the Masters of the Supreme Court on a series of interlocutory applications. When the case ultimately comes on and judgment is signed it appears that the whole of the defendant's resources really belong to his wife, or that he has gone to live in Southern Ireland.

In other words, if it is not one thing it is another; and I am prepared to say roundly with Prof. Keeton that for the average citizen of moderate means the machinery of civil litigation simply does not work. I have been at pains during the last 15 years to canvass the opinions of actual litigants as often as possible. It would not be true to say that I have never met a satisfied litigant; but it is true to say that satisfied litigants are about as scarce as home-grown peaches. It is also true to say that an appreciable number of them are satisfied not so much by their own success (which they admit was not an economic proposition) as by the discomfiture which they have been able to inflict on their opponents. The number of

meritorious litigants who have been genuinely and adequately assisted to enforce their rights by the process of the Courts is very small indeed.

It is deplorable to have to confess to this state of affairs, but the confession should surprise no one. The proposition that "the Law is an Ass" was forcibly expounded by Charles Dickens, but the conception was certainly not a new one in his day. The law has been so regarded by decently informed laymen for far more than a century, although they have always been strangely apathetic about it. Indeed, the dissatisfaction of litigants and the manifest inadequacy of the legal machine are not more astonishing than the respect and reverence in which it is held by that large majority of laymen who have never had anything to do with it. It seems to have become an accepted convention in English life to suppose (*a*) that our system of Civil Justice is the fairest, most dignified and most efficient in the world, and (*b*) that only a half-wit would ever have recourse to it. (*b*) is thoroughly sound doctrine, but it seems that only the unfortunate few who have been actually involved in litigation appreciate the falsity of (*a*); and for some reason or other their voice is not heard—presumably because it is felt that, having been such idiots as to fall into class (*b*), they cannot expect any sympathy for what they may have to say about point (*a*). The melancholy fact remains that although the legal machine has for many generations been operated by a most upright, industrious and intelligent class of men, it does not, broadly speaking, work at all.

There are many obvious improvements which can be and have been suggested. Fixed dates for trial and a remodelling of the circuit system are among them, but I believe that the measure of reform that is required goes far beyond recommendations of this sort. There is much to be said upon the comparative advantages of national control and private enterprise in various fields, and I have no intention of saying anything controversial on this topic. Everybody recognises, however, the disadvantages which tend to characterise either system: the redundancy, the red tape and the departmental delays associated with State control, and the commercial duress, the price controls and the dominance of the profit motive in private enterprise. Civil Justice is almost unique in enjoying the full disadvantages of both systems. Consider a Court of Justice. The Bench and the table below it form a thin transverse strip of Departmental territory. The Judge, the Associate, and, behind them, the whole apparatus of Central Office, Masters' Chambers, Scrivenery departments and what-not form a branch of the Civil Service maintained by taxation, receiving fees, prescribing rules, insisting upon forms, and inevitably imposing delays. The other part of the Court, however, is given over to independent practitioners engaged in fiercely competitive private enterprise, pushing up prices, trying to corner different types of business, and exploiting the procedural resources of the system to the utmost. All parties concerned are of accepted integrity, but none has a compelling motive to increase the efficiency of the machine as a whole. Those of the actors who are civil servants lack the spur to efficiency which the profit motive might provide. Those who are private practitioners can hardly be expected to press for the simplification of a machine whose complexity is the foundation of their earning power.

I do not doubt that if this strange anomaly were ended there would be a marked access of efficiency, whether the Courts were run wholly by private enterprise or wholly under State control. It is not widely known that the Government makes a small profit out of civil litigation. Private

enterprise would doubtless make more, and it is perhaps unlikely that it would sell justice at cheaper rates than the Government now does. It is not doubtful, however, that it would deliver the goods more quickly and conveniently. In the first place, it would certainly appoint one or more business managers to regulate the arrangement of the lists, a reform which has for long been urged from various quarters and which was formally recommended, in a passage which damned the present system, by the Royal Commission on the Despatch of Business at Common Law in 1936 (Cmd. 5065, paras. 149–167). Secondly, it would take the circuit system firmly in hand; and thirdly, it would ensure the hearing of cases on fixed dates. However, the idea of turning over Civil Justice, which ought obviously to be a social service, to a commercial corporation would no doubt be highly repugnant to the minds of the electors and is probably not worth pursuing. It is none the less worth pointing out that arbitration in preference to litigation is exceedingly popular in some circles. The essence of arbitration (though its object is often defeated by resort to the Courts on "cases stated" and the like) is the avoidance of official control and the conduct of the proceedings by private enterprise. It is a striking fact that people prefer to pay the fees of an arbitrator (or more often of two arbitrators and an umpire) rather than to resort to the impartial and highly-qualified Judges who are laid on free by the State.

But what about complete national control? This involves assimilating the solicitors' profession and the Bar (or at any rate the Bar) to the character of civil servants enjoyed by the Judges and minor Court officials, and thereby abolishing the distinction between costs and Court fees. Before considering the advantages which might be hoped for from such an arrangement, it may be as well to deal with some of the objections which will be raised. First and foremost, it will be said that a litigant has the right to choose his own advocate and that to have an unknown counsel allotted to him by the State would be unfair. This I absolutely deny. Although it has been the practice for centuries for the litigant to choose his own advocate there is no reason founded upon equity why he should be allowed to do so. He cannot choose his own Judge, whose personality is, or should be, far more important to the decision of the case. Moreover, it is extremely doubtful whether the freedom of the litigant to choose his own advocate does not play unfairly into the hands of the rich and lead in many cases to serious injustice. At any rate, it is widely believed among litigants that this is the case, as I have already mentioned. Nor is there anything novel or untried in the system of officially allotted advocates. It is one which already applies to all Poor Persons' litigation and is widely used in criminal proceedings. No one suggests that it does not work satisfactorily in these instances. Finally, it may be remarked that the present-day picture of the litigant choosing his own advocate is in nine cases out of ten an illusion. It is true that he may insist on retaining some counsel whose name is prominent in the Press, but he will probably never have met him in the flesh. Much more often, however, he has no views of his own on the subject and his choice is made for him by his solicitor's managing clerk.

Secondly, it may be said that advocates who are mere civil servants with no personal interest in the result of the litigation will bring less industry and enthusiasm to their work than if they were working simply for private gain. This appears to me to be a libel on civil servants as a class. It is, moreover, merely an angle of the time-honoured proposition

that all nationalised enterprise works badly while all private enterprise works well. The constant stream of bankruptcies and liquidations which occupy the Courts give the lie to the latter part of this proposition, and the successful working of the Post Office, the B.B.C., and the Royal Navy is a sufficient answer to the former.

Then again, it may be said that the reorganisation proposed would produce greater delays than at present. While this is not impossible, it seems to me to be extremely unlikely. The causes of delay at the present time are, broadly speaking, three. First, there is the delay which is inherent in that part of the system which is already under State control. This is not in fact very great, and it has often been remarked that where all parties to an action are really anxious to get on with it it is surprising how quickly it comes to trial. Secondly, there is the delay resulting from the present maldistribution of work at the Bar. The position in this somewhat overcrowded profession is normally (I speak of peace time) that a small number of practitioners have more work than they can reasonably cope with, while quite a large number have less than they deserve on their merits. The result is that the busier barristers are often compelled to keep papers waiting until they can find time to refer to books and write their opinions, while their clerks devote much time and energy to the task of preventing the hearings of cases from clashing, a process which inevitably involves some being delayed for the benefit of others. Thirdly, there is the large class of cases where delay is deliberately aimed at and paid for by one side or the other. Applications for trial by jury or Official Referee, for further particulars of the pleadings delivered, for changes of venue, for the addition of third parties, and the like, are often made solely for the purpose of embarrassing the opposition, as any experienced practitioner can attest. It would be difficult under any system to put an end to these practices, but it can hardly be doubted that they flourish more freely in the hot-house atmosphere of private enterprise than they would in the more temperate climate of State control.

Let us now consider the positive side of the proposal. There is no reason why the State should not maintain a corps of civil servants adequate both in numbers and ability to handle the presentation of cases for trial, just as it does for administering the Postal Service, the Factory Acts, and a hundred other enterprises. The members of such a service could be graded by seniority and ability and could be salaried upon a scale commensurate with their positions. In an age when new ministries and departments are created and organised almost every month it is idle to say that this thing cannot be done at all, just as it is idle to say that the coal mines or railways could not be nationalised. The question is not whether these things are possible but whether they are expedient.

It is difficult to think of any commodity which lends itself more properly to nationalisation than Civil Justice, a point which is surely recognised in the promise of Magna Carta to deny it to no man. It is curious that the obvious implication of this promise—not merely not to deny it, but actively to lay it on—has never been followed out.

It is not hard to envisage a system which would work in place of the present one which does not. A fully nationalised service would provide a sub-office of the civil Courts in every sizeable town. Indeed, this is so already, though the offices are only open for County Court business. The first step of any litigant, whether plaintiff or defendant, would be to call at his local office and declare the amount and nature of the dispute.

A solicitor practising in the locality would then be assigned to him. His opponent would similarly be provided with a solicitor, and if the two parties lived far apart the solicitors would be authorised to employ London agents as at present. The solicitors concerned would then discuss the case and see whether they could not arrive at a satisfactory settlement very much as they do at present, but with this difference: that since they would not be personally receiving the fees paid by the litigants they would be free from the temptation (to which far too many succumb at present) to prolong the dispute and run up unnecessary costs, and would therefore be a great deal more reasonable in their approaches to one another. This indeed would be one of the foremost benefits of a fully nationalised system. If the dispute could not be settled by negotiation the machinery for appointing counsel would then be invoked. If the will to reform were present it should not be impossible to establish an official service of salaried advocates who would be graded according to their seniority, their specialist lines of work, their local situations, and so on. Admittedly such a scheme would require a good deal of working out, but assuredly it could be done.

Not the least valuable of the results which might be expected to follow would be a new and juster conception of an advocate's duty to the public. I do not believe, as I have already stated, that advocates as a whole would bring less industry or enthusiasm to their work, but I do believe that the change in status which is suggested would tend to direct their efforts into healthier channels. In a paper on the "Ethics of Advocacy" read before the Royal Philosophical Society of Glasgow (now published in *Law and Other Things*, 1937, Camb. Univ. Press), Lord Macmillan most eloquently defended the Bar against what he described as "the deeply-rooted popular prejudice against the paid profession of advocacy," a prejudice which he admits is as old as the days of Greek comedy and is mainly based on the fact that the advocate practises for private gain. Lord Macmillan explains that the true nature of the advocate's work has always been and still is completely misunderstood by the public. But in spite of the cogency with which he puts his case it is surely permissible to wonder whether a popular distrust which has endured for so many centuries and shows no signs of abating has not after all got something in it—perhaps as much as the equally persistent belief that the Law is an Ass. Presumptuous as it may seem to challenge Lord Macmillan's opinion, I feel that there is a much sounder foundation for the distrust of the Bar than he allows. It is true, as he says, that there is an unwritten code of honour among advocates to which the vast majority of them faithfully adhere. It is the code itself which in my opinion requires revision.

Human nature is hardly equal to the strain of doing one's best for one's client, as it is currently understood at the Bar. Although it occasionally happens that a barrister misjudges his own client, it happens much more frequently that he does not. Over and over again counsel finds himself supporting a case which he knows to be thoroughly unmeritorious, and such is human vanity that success in such a cause is a thing which brings more satisfaction to the advocate than almost any other. Remarks like, "I had a great win to-day!" are heard constantly in the Temple, and what this means five times out of seven is that the speaker was successful in a case which both he and his opponent know very well he should have lost. It is in fact his talent for winning "hopeless" cases which so often leads a barrister to fortune. No one can read, for example, Edward Marjoribanks' *Life of Sir Edward Marshall Hall* without perceiving that his fame was

founded upon the wizardry with which he so often persuaded juries in criminal cases to acquit men who were demonstrably guilty or in civil actions to award thumping damages to plaintiffs whose merits did not deserve a farthing. Similarly, Mr. Maurice Healy, K.C., in his charming recollections of *The Old Munster Circuit*, tells the story of a libel action in which the late Lord Atkinson established himself in the first rank of advocates by a brilliant histrionic effort which resulted in a thoroughly deserving defence being laughed out of court. Legal biography teems with such anecdotes; and the point about them is that they are true. Success in the art of advocacy depends, not only in popular belief, but also largely in fact, upon a talent for making intelligent witnesses look like fools under cross-examination, for leading juries up the garden path, and for playing artfully upon the carefully studied psychology of judges. It is the reality of these practices, and not a misconception of the function of the Bar, which in my belief at once explains and justifies the popular distrust which the profession has always attracted. Nor is it possible to doubt that the profit motive and the intensely individual character of the advocate's work are responsible for his methods and outlook. Whether he is conscious of it or not, the success of a barrister in his profession depends upon his ability to make a personal impression on his clients and the Court rather than on his capacity to ensure that justice is done. Indeed, it is almost a commonplace at the Bar that one endears oneself to clients far more by losing cases at length and in spectacular fashion than by winning them shortly and with quiet competence.

It may be said that these things cannot be altered if the art of advocacy is to survive and are inseparable from counsel's duty to his client. But this is not so; for there are already two standards of advocacy recognised at the Bar in criminal cases: the standard by which one prosecutes and the standard by which one defends. It is difficult to draw a line between the restraint which is enjoined upon counsel for the prosecution and the latitude which is allowed to counsel for the defence, but the distinction is well recognised even among the public at large. (Not many years ago an eminent K.C. who appeared for the Crown in a murder trial was reproached by the Press for resorting to forensic fireworks which would have drawn only admiring comment if they had been let off from the other side of the court.) It is surely reasonable to believe that, lacking the stimulus of the profit motive and the necessity for making vivid impressions, the Bar would adopt the more temperate prosecuting technique as an unwritten code applicable to all departments of advocacy; and it is certain that, if they did so, much time and money would be saved and both the confidence of the public and the administration of justice would be much enhanced.

The financing of nationalised justice will clearly present some formidable problems. But it is worth bearing in mind that that part of it which is already nationalised at present pays a small dividend. The other part of it has always been run on such extravagant and individual lines that no one could ever have expected it to be an economic proposition. A completely nationalised service which did away with private bargains between lawyers and their clients would no doubt involve a substantial increase in Court fees, but one can feel reasonably sure that the total of the addition under this head would amount to far less than half of the amount which passes privately under the present system between litigants and their professional advisers. Moreover, Court fees should not normally

be charged at all in respect of appeals, for the costs of a successful appeal ought to be paid wholly by the State and the costs of an unsuccessful appeal wholly by the appellant. In any case, however, the system could not afford to stultify itself by increasing Court fees to a deterrent extent; they must obviously be kept within limits which leave Civil Justice as an attractive proposition and a genuine social service, and a substantial balance will in any case have to be found by taxation. But we are used to taxation. If we are prepared to spend £14 millions a day upon the prosecution of the war, we cannot but be willing when it is all over to offer some trifling *douceur* to the angel of peace. Surely the cause is worth some sacrifice? Lord Hewart was wont to remark that it was no more important that justice should be done than that it should manifestly seem to the public to be done, but this happy ideal has never yet been approached in the sphere of civil litigation. *Ubi jus, ibi remedium* is to the the man in the street nothing but a pretentious misstatement of his everyday experience, and will remain so for as long as he finds that the gulf between *jus* and *remedium* is bridged only by a *pons asinorum*.

C. P. Harvey.

THE END OF *CHANDLER* v. *WEBSTER*

THE decision of the House of Lords in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122, means, said Lord Macmillan, that "*Chandler* v. *Webster* and its congeners must be consigned to the limbo of cases disapproved and overruled." "They will be unwept," he added, "save by those to whom for so many years they have furnished a fruitful and enlivening topic of discussion in lecture rooms and periodicals." The qualification was unnecessary, for those of us who obtained pleasure from discussing *Chandler* v. *Webster* will now be just as happy to discuss the decision of their Lordships that supersedes it.

The facts of the *Fibrosa* case were that an English company contracted to deliver certain machinery to a Polish company, c.i.f. Gdynia. The contract was made in July, 1939, and in September, 1939, before the date for delivery, Gdynia became occupied by enemy forces. Two questions arose for decision: (1) Whether the contract was discharged by the enemy occupation of Gdynia, (2) (if so) whether an advance payment that had been made by the buyers was recoverable by them.

Upon the first question it was held, affirming the courts below, that the contract was "frustrated." Viscount Simon, L.C. (at p. 125 H), and Lord Porter (at p. 147 B), also pointed out that the contract could not be further performed because of supervening illegality. The nature of these two modes of discharge will be considered at the end of this article. The only matter of debate on this first question was whether the contract was kept alive by a clause therein to the effect that if dispatch were hindered by any cause beyond the sellers' reasonable control, including (*inter alia*) war, a reasonable extension of time should be granted. The House had no difficulty in holding that this clause referred only to minor delay and not to the prolonged and indefinite interruption occasioned by this war.

The second question arose in the following way. By the terms of the contract one-third of the purchase price (viz. £1600) was to be paid at the time when the order was given. In fact, only £1000 was so paid, and the action was brought to recover this £1000. It was held, overruling the courts below, that the buyers were entitled to recover, not as a matter of implied contract but in quasi-contract as money paid for a consideration that had totally failed. Their Lordships treated this decision as overruling *Chandler* v. *Webster*, [1904] 1 K.B. 493.

From a technical point of view the chief difficulty was the decision in the *French Marine* case, [1921] 2 A.C. 494, where the House had approved the rule in *Chandler* v. *Webster*. (See *ante*, Vol. V, pp. 9–13.) The way in which the *French Marine* case was treated in the *Fibrosa* case is interesting and important from the point of view of the doctrine of precedent. The *French Marine* case was not, of course, overruled. The House, though it may do the *fortiter in re* with regard to its own previous decisions, would not dream of behaving otherwise than *suaviter in modo*. Suavity in this context may consist either in ignoring or in distinguishing the obnoxious precedent. Both these methods were applied to the *French Marine* case. Viscount Simon, L.C., did not refer to it, except in the course of a quotation from *Cantiare San Rocco* v. *Clyde Shipbuilding Co.*, [1924] A.C. at 241. The quotation is from the speech of Viscount Finlay, who said that Lord Parmoor's statement in the *French Marine* case of the rule in *Chandler* v. *Webster* "forms no part of the judgment of the House of Lords in that case." This statement of Viscount Finlay's was only *obiter*, and ignores the fact that the other two majority law lords in the *French Marine* case, Lords Dunedin and Sumner, also took the rule in *Chandler* v. *Webster* as a ground of their decision. Returning to the *Fibrosa* case, the next Law Lord to refer to the *French Marine* case was Lord Atkin (p. 132 B), who again cited the dicta in the *Cantiare San Rocco* case as showing that the *French Marine* case was not conclusive, and distinguished it on the ground that there was in that case (as Lord Sumner had expressly held) only a partial failure of consideration. This again ignores the fact that the ground stated was only the second of three reasons given by Lord Sumner for deciding as he did, and that the first of these reasons was the authority of the Coronation Cases.[1] Of the next two law lords, Lord Russell did not deem the *French Marine* case worthy of any reference, and Lord Macmillan referred to it only in the same oblique way as Viscount Simon. Lord Wright, however, subjected the *French Marine* case to a battery of technical argument. "The most obvious and shortest answer," he said, was that according to the *obiter dicta* in the *Cantiare San Rocco* case the question of *Chandler* v. *Webster* was still open to review by the House. Next, the decision in the *French Marine* case "may have been affected by the English rule as to advance freight." Next, "their Lordships were divided in opinion, and it is not clear that there was any real agreement among the majority as to the *ratio decidendi*." Lord Wright then went on to state the second and third grounds of decision given by Lord Sumner in the *French Marine* case, carefully refraining from saying that Lord Sumner, like the other two majority lords, had also rested his judgment upon the Coronation Cases. Lord Roche also appears to have

[1] The particular one of the Coronation Cases to which Lord Sumner referred was *Elliott* v. *Crutchley*, [1904] 1 K.B. 565 at 568, where Collins, M.R., restated the rule in *Chandler* v. *Webster*, then recently decided. See further, MODERN LAW REVIEW, Vol. V, p. 11.

distinguished the *French Marine* case by reference to the third ground taken by Lord Sumner. Finally, Lord Porter distinguished it as being either a decision influenced by the law as to advance freight or a case on partial failure of consideration (Lord Sumner's second ground). A strict adherent of the doctrine of precedent might regard all this as very cavalier treatment of their Lordships' previous decision. But it will cause much satisfaction among the ranks of those who are opposed to the strict doctrine.

Having conjured the *French Marine* case out of the way, and having decided that money paid in advance was to be recoverable on a total failure of consideration, the next question that arose was whether there was such a total failure on the facts of the *Fibrosa* case. Against the totality of the failure there were two possible arguments.

(*a*) The first argument was that the promise of the sellers to deliver the goods was originally valid and binding, that the frustration of the contract did not render the promise void *ab initio*, that the buyers had the advantage of the seller's promise for a certain time, and that there was therefore no total failure of consideration. Viscount Simon, L.C., answered this argument by a proposition that has not before been judicially stated in England, though it has always (I submit) been clear on principle. "In English law," he said, "an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act—I am excluding contracts under seal—and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration; but, when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails, the inducement which brought about the payment is not fulfilled" (p. 129 B; cp. Lord Russell at p. 133 E, and Lord Wright at p. 141 C–D). Lord Atkin (at pp. 131–2) denied this, saying that he did not think it necessary to use the word "consideration" in two meanings. But he went on to say that he understood by the phrase "failure of consideration" as applied to the facts before him "that the promise to deliver goods totally failed because no goods were or could be delivered." With great respect to Lord Atkin, what failed was not the promise but the performance of the promise. If there were in truth a failure of the defendant's *promise*, the plaintiff's promise to pay would have been *nudum pactum*. In actual fact an obligation discharged for failure of consideration is not regarded as *nudum pactum*, and thus "consideration" in the phrase "failure of consideration" must be used in a different sense from its use in the law of formation of contract.

(*b*) The second possible argument against the existence of a total failure of consideration was that the defendants had partly completed the machines. Their Lordships, however (with the possible exception of Lord Porter), were clearly of opinion that this fact made no difference. Lord Roche mentioned incidentally that the machines, so far as completed, were realisable by the sellers without loss (p. 143 F), but it seems clear that this was not an essential factor in the decision. Thus Viscount Simon said that while the reversal of *Chandler* v. *Webster* "obviates the harshness with which the previous view in some instance treated the party who had made a prepayment, it cannot be regarded as dealing fairly between the parties in all cases, and must sometimes have the result of leaving the

recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connection with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons that are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances. . . . It must be for the legislature to decide whether provision should be made for an equitable apportionment of prepaid moneys which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid" (pp. 129 130). Similarly Lord Atkin said: "That the result of the law may cause hardship . . . is incontrovertible. One party may have almost completed expensive work, yet he can get no compensation" (p. 132 F). So also Lord Wright, although he devoted a considerable part of his speech to showing that the law of quasi-contract rested upon justice and conscience, observed that "the standard of what is against conscience in this context has become more or less canalized or defined" (p. 136 H). Thus he was able to say, without inconsistency, in a later part of his speech (p. 141 E), that "no doubt in some cases the recipient of the payment may be exposed to hardship if he has to return the money, though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which become valueless to him when the contract fails, so that he gets nothing and has to return the prepayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice." Lord Porter uttered remarks to the same effect (p. 144 F H). Somewhat inconsistently, Lord Porter distinguished *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875), L.R. 10 C.P. 271, *Blakeley* v. *Muller & Co.*, [1903] 2 K.B. 760, *n.*, and *Lumsden* v. *Barton* (1902), 19 T.L.R. 53, as instances of contracts partly performed (p. 145 A, F); yet they were no more partly performed than was the contract before him. Lord Porter also made an effort to find an excuse for *Chandler* v. *Webster*, saying that it was wrongly decided "unless it can be said that in that, as in some of the other cases, there was some partial performance which I have not been able to discover in the report of the case" (p. 147 C D). With respect it is submitted that even if the defendant in *Chandler* v. *Webster* had incurred a detriment in performing his part, this fact would not have prevented there being a total failure of consideration *vis-à-vis* the plaintiff. It is further submitted that the three other cases cited by Lord Porter (see above) are among what Lord Macmillan calls the congeners of *Chandler* v. *Webster* that are overruled by the *Fibrosa* case.[2]

If this is so, it is evident that the *Fibrosa* decision is not necessarily to be justified by reference to natural justice. It subserves natural justice only where the defendant who has received the money has done nothing at all in return, or where (as in the *Fibrosa* case itself) the product of his

[2] Lord Porter also distinguished, as instances of contracts partly performed, the decisions in *Stubbs* v. *Holywell Ry. Co.* (1867), L.R. 2 Ex. 311, and *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78. These cases involved different considerations from the above. *Stubbs* v. *Holywell Ry. Co.* was not a case of partial failure of consideration in the usual sense; it concerned a severable contract in which a severable part of the consideration had been fully performed. *Whincup* v. *Hughes* was one of the apprenticeship cases, which will be considered later.

work, which he retains, is itself of sufficient value to compensate him adequately. Where, on the other hand, the defendant has suffered loss in the part performance of his side of the contract, and both parties are morally innocent, there may be no more natural justice why the defendant should restore the advance payment than why he should not. The truth is that in a case like this natural justice does not enter into the question. The situation is simply the familiar one in which a loss is bound to be sustained by one of two parties, or partly by both. The question for the court is how the loss is to be borne, and of this natural justice (on my understanding of it) gives no indication beyond decreeing that a party who has received and retains a benefit from the other party should pay for it. Apart from this there is no generally-accepted principle of natural justice that indicates which of two innocent parties shall bear a loss. Or, if there is any such principle, it is that the loss should be split between the parties, thus giving the party who has partly performed an action for half his loss. In support of the latter principle it might be urged that if the contract had been carried out both parties would presumably have been advantaged by it; thus why should they not share the loss that unexpectedly occurs? Such a rule, too, would accord with sound economic policy, for in the usual case the two parties can each sustain half the loss much better than one party can sustain the whole loss. That is the basis of insurance. However, the common law seems to have an aversion to splitting loss, and therefore such a rule must be created, if at all, by legislation. The alternatives that the common law sees presented are simply whether, on a total failure of consideration, (1) restitution of the advance payment should be decreed, or whether (2) restitution of the advance payment should not be decreed. The House of Lords has now decided in favour of (1). The objection to *Chandler* v. *Webster*, which decided (2), was not necessarily that it was against natural justice but that it was an exception to general principles of failure of consideration, for which exception no reason could be assigned, and that it introduced an irrational distinction (as regards the ultimate rights of the parties) between cases where money had been paid in advance and where it had not. The merit of the *Fibrosa* case is therefore that it restores elegance to this branch of the law.

Hitherto we have assumed that there can be no recovery of money paid on a consideration that partially fails.[3] This rule is accepted on all hands, but its precise meaning is not at all clear. In view of the decision in the *Fibrosa* case we must understand that there is deemed to be a total failure of consideration even though the defendant may have gone to expense in partly performing his part of the contract. When, then, is a failure of consideration deemed to be only partial? Is the failure of consideration deemed to be only partial, so that no recovery of money paid is allowed, whenever the defendant's partial performance has benefited[4] the plaintiff? Or are we to say even in this case that the consideration, as the phrase is, "by failing partially, fails entirely"? If so, "partial failure of consideration" must have a very narrow meaning. It must be confined to cases where (*a*) the plaintiff has received substantially the

[3] A quasi-exception is where the contract is severable and there is a total failure of consideration as to a severable part: cp. *per* Lord Wright at p. 137 G, Lord Porter at p. 144 B.

[4] "Benefit" may include a constructive benefit. See (1941) 57 L.Q.R. at 396.

whole benefit that he was to receive under the contract, or where (*b*) the failure was as to the quality of performance and not as to the quantity of performance.[5]

On these questions the decision in the *Fibrosa* case cannot be decisive, for none of them was there in issue. Nevertheless the answers to the questions are of importance in determining the extent to which the decision is likely to be carried in the future. According to the weight of authority, the rule has hitherto been that whenever the plaintiff has received part of the benefit that he was intended to receive there is no total failure of consideration, and accordingly no quasi-contractual recovery of money paid. This is, for instance, the rule in the apprenticeship cases (*ante*, Vol. v, pp. 5 6), which decide that where master or apprentice dies within the term no part of a prepaid premium is recoverable, for the reason that there is but a partial failure of consideration. In the apprenticeship cases the partial performance benefited the apprentice, whereas in the *Fibrosa* case the partial manufacture of the machines did not benefit the buyers. It may be, therefore, that the apprenticeship cases are still good law. That this is so is borne out by the fact that in the *Fibrosa* case, as we have already seen, the *French Marine* case was distinguished as a case of partial failure of consideration, and in the *French Marine* case, too, the plaintiffs received a benefit from the partial performance. There are other dicta in the *Fibrosa* case that support the same view. Thus Lord Atkin said (at p. 132 F): "The other party may have paid the whole price, and, if he has received but a slender part of the consideration, he can get no compensation" (probably meaning by the last word "restitution"). Lord Russell said (at p. 133 C): "Nor could moneys paid before frustration be recovered if the person making the payment has received some part of the consideration moving from the other party for which the payment was made."

However, both these statements were *obiter*, and it may be pointed out that there is a difficulty in the way of saying that the receipt of a benefit excludes a total failure of consideration. The difficulty is that one thereby introduces a distinction between the law of quasi-contract and the law relating to the discharge of an executory obligation for failure of consideration, for in the latter branch of the law the general principle is clearly that the acceptance of a benefit does not exclude a total failure of consideration. If, for instance, an apprenticeship agreement were entered into in which the premium was payable at the end of the term, and the master or apprentice died within the term, it seems clear that no part of the premium would be recoverable, for the consideration, by failing partially, would fail entirely. In the case of such an executory obligation every failure of consideration is, according to the weight of authority, regarded as total except in the two cases already stated, viz. where the plaintiff has received substantially the whole benefit or where the failure was merely as to the quality of performance.

Another difficulty is a passage in Lord Wright's speech (at p. 141 C), in which, after referring to an alleged rule of Scots law whereby "the payer who has paid in advance should give credit to the extent that he is *lucratus* by any part performance," Lord Wright said: "I do not wish to discuss how far, if at all, this is open in English law." Now if the view just stated be correct, that a payer who has paid in advance and is *lucratus* by part performance cannot recover his payment, there is no question of his

[5] I have dealt with (*a*) and (*b*) in (1941) 57 L.Q.R. at 493–6.

having to give credit to the extent of the *lucrum*, and so there was no question for Lord Wright to refuse to discuss. The passage may therefore mean that in Lord Wright's view quasi-contractual recovery is not excluded merely because the plaintiff has received a benefit, and the only question is how much the plaintiff recovers. However, the hopes raised by this passage are rather dashed by a later remark of Lord Wright (p. 141 E–F), where he says that the common-law remedy is imperfect because it depends on a total failure of consideration, and that "courts of equity have evolved a fairer method of apportioning an entire consideration in cases where a premium has been paid for a partnership which has been ended before its time (Partnership Act, 1890, s. 40), contrary to the common law rule laid down in *Whincup* v. *Hughes*. Some day the legislature may intervene to remedy these defects." This seems to recognise the authority of the apprenticeship cases, of which *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78, was one. It must also be remembered that the House of Lords could not overrule the apprenticeship cases without another drastic "distinguishing" of the *French Marine* case.

If, despite these difficulties, the House of Lords were to find itself able to declare that money paid is recoverable notwithstanding the fact that the plaintiff has received a partial benefit, this would be an important step towards the most satisfactory solution of the problem that the common law could reach. But it would not in itself be satisfactory, for clearly a rule allowing quasi-contractual recovery of the money paid would need to be balanced by a further rule allowing quasi-contractual recovery on the other side for benefits conferred. If both these rules were adopted it would follow that, to the extent that the party who has partly performed has conferred a benefit upon the other party, the payer, he would naturally have a right to deduct the value of this benefit in repaying the money. This is exactly the alleged rule of Scots law referred to by Lord Wright.[6]

[6] The Law Revision Committee, in its Report on the Rule in *Chandler* v. *Webster*, proposes a different rule, namely that there should be a right to deduct the amount of expenditure incurred. If the principle be accepted that the final rights of the parties ought not to depend upon the accident of a payment in advance, the Committee's suggested rule would seem to involve the consequence that, irrespective of a payment in advance, a party who has partly performed ought to have a quasi-contractual action to recover the amount of expenditure incurred. There are several objections to such a rule. (1) It runs contrary to the general principle of quasi-contractual recovery, which is that recovery is based on benefit conferred, not detriment incurred. An exception is the rule in *Collen* v. *Wright* (1857), 8 E. & B. 647, but where this rule operates the defendant has usually been at fault, whereas in the case now under discussion the defendant is not at fault. (2) A more serious objection to the rule is that there seems to be no reason for it. Those who take objection to the rule that the loss must lie where it falls seem to suppose that natural justice requires a directly opposite rule, namely that the loss shall always be picked up from where it happens to fall and transferred to the shoulders of someone else who but for the working of the law would not have borne it. I cannot see that this represents natural justice any more than the rule objected to. The truth is, as I suggested before, that natural justice has nothing to say upon the distribution of loss between innocent parties, unless it says that the distribution shall be equal. Unless we are going to distribute the loss equally the best thing we can do is to leave it where it falls, and forbear from working the cumbrous machinery of the law for no social purpose whatever. (3) Even if the Committee's rule be adopted, it should not bar the adoption of the rule in the text, which can be worked cumulatively with it. Better still, the rule in the text (imposing liability for benefit received) can be worked cumulatively with the rule I have just suggested, imposing liability for half the net loss of the other party. I have discussed the Committee's rule at length in (1941) 57 L.Q.R. 504–511.

However, to bring about this second rule by judicial legislation would be just as difficult as to bring about the first. While the establishment of the first rule would necessitate an overruling of the apprenticeship cases and their congeners, the establishment of the second rule would involve an overruling of *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, and its congeners. The speeches in the *Fibrosa* case hold out little hope that *Appleby* v. *Myers* will be overruled. Such hope as there is comes from passages in the speeches of Lord Wright and Viscount Simon. The passage in Lord Wright's speech is that just quoted, where Lord Wright reserved the question how far, if at all, "the payer who has paid in advance should give credit to the extent that he is *lucratus* by any part performance." Even if this question were settled in the affirmative, the law would still fall short of perfection unless it gave recompense also to the part-performer who had *not* received payment in advance. On this Lord Wright referred to the *Restatement*, and pointed out that the law of the United States "seems to go beyond the mere remedy of claims for money had and received and allow the recovery of the value of the benefit of any part performance rendered while performance was possible. Such and similar claims should be recognised in any complete system of law, but it is not clear how far they have been admitted in English law" (p. 141 B). It is at least a step in the right direction to regard the law as "not clear." Viscount Simon gives us another straw to clutch at when, after quoting the decision in *Appleby* v. *Myers* "that both parties were excused from further performance, and that no liability accrued on either side," he said: "The liability referred to, however, was liability under the contract" (p. 128 H). This seems to leave open the possibility of a later court "distinguishing" *Appleby* v. *Myers* by saying that that case turned on contractual liability and does not bar the giving of a quasi-contractual remedy. The passage at the end of the same speech, already quoted, may be thought to be against this. Here the Lord Chancellor said that the defendant "may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances." This statement is true, but its meaning must be understood. The mere fact that the defendant has sustained a detriment in performing part of his duties under the contract does not give him a quasi-contractual remedy, for quasi-contractual redress depends upon benefit conferred, not detriment incurred. Since he has no action for compensation, he has no right of retainder out of the money that he is compelled to repay. Therefore, this particular statement of Viscount Simon does not touch the question whether there may not be a quasi-contractual remedy for benefit conferred, and a consequential right of retainder of the value of benefit conferred. The same remark applies to the statement of Lord Atkin that "at present it is plain that, if no money has been paid on the contract, there is no legal principle by which loss can be made good" (p. 132 F; cp. Lord Russell at p. 133 C). This does not assert that there is no legal principle by which *benefit conferred* can be compensated. On the other hand it must be admitted that the tenor of the speeches of Lords Russell, Macmillan and Roche is against the possibility of any further extension of quasi-contractual recovery in this type of case.

To return to the actual decision in the *Fibrosa* case, something more must be said about its limits. One limit we have already seen, that it

applies only where there is a total failure of consideration (whatever that ambiguous phrase may mean). Another limit is that it does not apply if "expressly or by proper implication" (as Viscount Simon put it, at p. 126 G), it is agreed that no money is to be returned in the event that happens—in other words if the stipulation for payment in advance is intended *pro tanto* to shift the risk. Cp. Lord Wright, at p. 139 A. Viscount Simon's phrase "proper implication" is very welcome; it suggests that the court will not imply an agreement to this effect unless it is satisfied that the parties really agreed it—in other words, it suggests that the implication is not to be the spurious sort of implication that is based upon what two reasonable contractors would have done. It is to be hoped that the courts will in fact avoid spurious implication in this matter. The only doubt as to the exact rule is raised by the speeches of Lords Roche and Porter. Lord Roche suggested that *Chandler* v. *Webster* was decided on the ground that the payment was a "final one," and that it was unnecessary to consider whether, on this ground, the case was rightly decided (pp. 142–3). Lord Porter, too, expressed this view of the decision in *Chandler* v. *Webster*, and observed simply that "the question whether the payment of the £1000 in advance in the present case was a "final payment' or not depends on no general principle of law but upon the wording of the contract in the particular case" (pp. 146–7). With the utmost respect it is submitted that this is not the best way of putting the matter. Unless every case of this sort is to be litigated, there must be a general principle of law one way or the other. It is submitted that, notwithstanding Lord Porter's dictum, there is now a general principle of law that the *mere* stipulation for payment in advance is not to be taken as indicating an intention to shift the risk *pro tanto*. The reason is that the stipulation may have been inserted for other purposes. As Lord Roche pointed out (at p. 143 B), the prepayment "had advantages for the [sellers] in affording some security that the [buyers] would implement their contract and take up the documents and pay the balance of the price, and it may be that it had other advantages in providing finance for the manufacture of the machines." Lord Porter himself said (at p. 144 H): "It is possible to say that the seller in such a case who has been prudent enough to stipulate for a payment in advance should reap the advantage of his foresight, but to do so is to speculate as to the object for which the advance was obtained." Of course, an intention to shift the risk to the extent of the prepayment (or altogether) may be stated in express words or gathered from the general wording of the contract or conduct of the parties in accordance with the usual rules of interpretation.

Another limit upon the decision in the *Fibrosa* case is that, according to Lords Wright, Roche and Porter (pp. 139 A, 142 G, 145 B), it does not affect the rule precluding recovery of prepaid freight. The reasons for saving this rule are not at all clearly stated. Lord Wright said (at p. 139 A): "The contract may exclude the repayment. An illustration of this is afforded by advance freight, which by English law is not recoverable if the delivery of the goods is prevented by the act of God, perils of the seas or other excepted cause, which excludes an action for damages. . . . The irrecoverable nature of the payment is then determined by custom or law, unless the contract provides for the contrary." This passage seems to be self-contradictory, for whereas Lord Wright begins by saying that "the contract may exclude the repayment," he immediately refers

the irrecoverable nature of the payment to "English law," and at the end of the sentence to "custom or law." Which, if either, of these alternatives are we to choose? Obviously it is not a rational explanation of the rule to say that the rule rests upon English law; that is a statement of the rule, not an explanation of it. Nor can it be said that the rule rests upon the express agreement of the parties. This leaves us only with agreement that is implied from custom or otherwise. But if by "custom" is meant a custom rendering prepaid freight irrecoverable, there is this to be said, that the custom is one that springs from judgments. Whatever may be the relation between *Themistes* and custom in early law, this is quite clearly a case where *Themis* precedes custom. I cannot imagine any charterer giving up his claim to the repayment of prepaid freight on the loss of ship or cargo, until he found that English courts would not give him a remedy. In thus refusing a remedy, England is "unique among the nations of the trading world" (*per* Lord President Inglis in *Watson* v. *Shankland* (1871), 10 M. 142 at 151). There is no explanation of how the custom of merchants with regard to prepaid freight comes to be different in England from the rest of the world, except the explanation that English courts have made it so. In ultimate analysis, then, to justify the perpetuation of the rule simply on the ground of custom amounts to justifying it on the ground of precedents of long standing that have created expectations. The same ground might have justified an affirmation of *Chandler* v. *Webster*. The decision in *Chandler* v. *Webster* had stood for thirty-eight years, and had several times been followed by courts of first instance and the Court of Appeal; indeed, it had even been followed by the House of Lords. It is, therefore, to be presumed that contracts had been made on the faith of it. Admittedly the decision in *Chandler* v. *Webster* had been criticised, but so had the rule as to prepaid freight.

There are, however, two possible answers to the question why the prepaid freight rule should be treated as exceptional. The first is an answer from authority. The House of Lords is precluded from reviewing the rule as to prepaid freight because it has already approved it, namely in *Allison* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209. This is not an answer that appeals to the intelligence. A second, and better, answer is that a contract of affreightment itself provides evidence of the intention of the parties that the prepaid sum shall be irrecoverable. The intention is to be inferred not from "custom" in general but *from the custom whereby a shipowner, in receiving an advance payment, gives a rebate of insurance*. This shows the intention of the parties that the advance freight is to be insured by the charterer, and therefore that the risk is to this extent to be with the charter. The custom, as Lord Hatherley said in *Allison's* case (at p. 237), "is founded very probably upon the determination of the Courts of Law, that prepaid freight cannot be recovered back." But although founded on judicial decisions the custom now prevents judicial decisions from being changed, for it shows that the parties intend them to be adhered to. If in any particular case no rebate of insurance were given, I respectfully submit that prepaid freight ought to be recoverable on loss of the cargo in accordance with the general principle laid down in the *Fibrosa* case.

We can now return to a point that was made at the beginning of the note. This concerns the way in which the contract in the *Fibrosa* case was discharged. Two Law Lords (Viscount Simon and Lord Porter) regarded

it as at an end for both of two reasons, namely frustration and supervening illegality; the others spoke only of frustration or legal impossibility (which is not the same as illegality). It appears from a remark of Lord Porter (at p. 147 C) that the exact distinction between frustration (or impossibility) and illegality had not been argued. As their Lordships decided the case, the distinction was not important, for it was clearly held that the plaintiffs succeeded however the contract was discharged.[7] I have submitted elsewhere that if in any particular case the distinction is important the rules of illegality should prevail (McElroy, *Impossibility of Performance*, xxx–xxxi). It is, however, worth enquiring more closely in what sense the contract in the *Fibrosa* case could be said to be discharged for frustration or illegality. The act that became impossible or illegal was the delivery of the machines in Gydnia. This was an act that was to be done by the sellers; thus it could truly be said that the sellers' obligation was discharged for impossibility (or frustration) or illegality. But the buyer's obligation was simply to pay money, and there was no impossibility in paying money. It is not even very clear that it would have been illegal (i.e. as being against public policy) to pay the money. The matter can be tested in the following way. Suppose it had been expressly provided in the contract that in the event of the delivery of the machinery becoming illegal the buyers should still be under an obligation to pay for it; would that stipulation have been illegal? It is difficult to see why it should be. If such a stipulation would not be illegal that would prove that the buyers' obligation in the *Fibrosa* case was not discharged for illegality, for it is impossible to contract out of discharge for illegality. Very well then: if the buyers' obligation in the *Fibrosa* case was neither impossible of performance nor illegal, on what ground were the buyers discharged? The answer given us by the House of Lords is that they were discharged for "frustration." If we ask what is meant by "frustration," we are told that it is an implied term in the contract. If we ask how this term comes to be implied, we are told that it is not really an implied term at all but a rule of law. "What is implied," said Lord Wright, "is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed" (p. 140 F). Suppose we were now so eager to get to the bottom of things as to ask why and when the court so interferes with the contract? On what ground, for instance, were the buyers discharged in the *Fibrosa* case? (Incidentally this is the same question

[7] Yet in *Re Commercial Banca Italiana*, [1942] 2 All E.R. 208, Simonds, J., seemed to treat it as an open question "what is the effect of the reversal of the rule in *Chandler* v. *Webster* [i.e. in the *Fibrosa case*] where it has become illegal for the party who claims to be aggrieved himself to demand or accept performance of the contract." The doubt is difficult to understand. Surely in the *Fibrosa* case it was "illegal for the party who claimed to be aggrieved himself to demand or accept performance of the contract," yet that fact was treated as immaterial. Simonds, J.'s, actual decision was extraordinary. He held that even if customers of the Italian bank had, upon the outbreak of war with Italy, a quasi-contractual action in England to recover money deposited with the bank, still the bank could not on this account be regarded as owing them "unsecured debts" within the meaning of the Trading with the Enemy Act, 1939, s. 3A (3). No reason was given for this except the authority of three cases decided on the similar Act of 1916. Of these three cases, the first (*Re Kastner & Co.*, [1917] 1 Ch. 390) merely turned on the position of secured creditors under the Act. The other two (*Re Dieckmann*, [1918] 1 Ch. 331, and *Re Francke & Rasche*, [1918] 1 Ch. 470) merely decided that a future or contingent debt did not come within the Act. It is difficult to see what application this had to the facts before Simonds, J.

as we asked a little time back, before we were fobbed off with the talk of frustration and implied terms.) Is is not clear that ultimately the answer that must be given us is that the buyers were discharged because they did not get what they bargained for? In other words, because there was a failure of consideration? In a context like this, "frustration" *means* failure of consideration, and the law would be a lot clearer if we were to call it by that name. In the *Fibrosa* case the House of Lords assumes that the contract is discharged for frustration, and that, the contract thus being at an end, the buyer recovers his payment on the ground of failure of consideration. If we were to say instead that the buyer's obligation is discharged for failure of consideration, and that he recovers his payment for failure of consideration, we should see instantly that there are not two principles involved, but one, namely failure of consideration. It is the failure of consideration that both discharges the buyer's executory obligation and gives him a right to restitution of money paid.[8] In the course of a friendly and courteous review of McElroy's *Impossibility of Performance* in the last number of this REVIEW (Vol. V, p. 279), Professor Chorley wrote: "The tide has set so strongly against this thesis, attractive though it is, that it may be doubted whether even the House of Lords can turn the flow." The submission I respectfully make is that the tide against the thesis is mainly a tide of words. Instead of using the phrase "failure of consideration," as they used to do, the courts have taken to describing the payer's obligation as discharged for "frustration" (the word "frustration" having other applications besides this one, with which I am not here concerned). It still remains to be demonstrated that there is a difference of meaning between the two expressions in this context.

GLANVILLE L. WILLIAMS.

[8] I am aware that there is one difference between the failure of consideration that discharges an executory obligation and the failure of consideration that gives a right to restitution. This is that whereas the receipt of part of the benefit does not (according to the weight of authority) prevent the discharge of an executory obligation (since "the failure of part of an entire consideration is a failure of the whole consideration"), the receipt of part of the benefit is enough (according to the weight of authority) to exclude quasi-contractual recovery. However, it does not seem to me that this difference affects the identity between the two branches of the law in other respects.

DENATIONALIZATION

I. SOME HISTORICAL FACTS

1. The laws of many States contain provisions concerning the loss of nationality[1] by emigration without consent of the authorities, by absence of long standing, by entry into the services and particularly the military services of another Power, etc. In all these cases, the loss of nationality is caused by voluntary acts of the persons concerned. The application of these provisions was a very restricted one. They were applied in sporadic individual cases only; the number of persons who had been declared stateless by virtue of such provisions has been at all times

[1] The terms "nationality" and "national" are used in these lines in the same sense as the German terms "Staatsangehoerigkeit" and "Staatsangehoeriger."

rather small, so that there was scarcely ever a reason for international implications.

2. Quite different is the effect of the denationalization laws enacted by several States after the Great War, laws which led to mass-denationalization, the reasons for which were mostly not a criminal or otherwise condemnable behaviour of the individuals concerned, but their political or religious creed or their racial origin. The deprivation of nationality introduced by this legislation takes place partly *ipso jure*, partly by virtue of special decrees issued by the authorities under the respective legal rules; obligatory or facultative confiscation of property is as a rule coupled with these measures.

Before dealing more extensively with the latest legislation of this kind, the German Order of 25th November, 1941, I propose to mention shortly some predecessors of this legislation.

(*a*) Under the Decrees of 15th December, 1921, 29th October, 1924, and 13th November, 1925, enacted by the Government of the *U.S.S.R.*, the nationality of the U.S.S.R. is forfeited by persons who had lived abroad for more than five years without having applied for a passport by a certain date; further by persons who had left Russia after 7th November, 1917, without consent of the Soviet authorities; by persons living abroad who had failed to register with the representative of the U.S.S.R. in the respective country; and finally by all persons who had taken part in a counter-revolutionary organization. Hundreds of thousands of people have been deprived of their former Russian nationality by these measures, with regard to which Sir *John Fischer Williams*[2] states that "no denationalization on any such scale as this has hitherto been known in history."

(*b*) An *Italian* Decree of 31st January, 1926, provides that an Italian subject loses his nationality if he commits abroad an act destined to disturb the public order in Italy or the consequences of which tend to do harm to the Italian interests or to diminish Italy's reputation or prestige, even if such acts do not constitute an offence. This law was amended by a Decree of 25th November, 1926, declaring as a criminal whoever spreads abroad any false or exaggerated or tendentious news about the internal situation in Italy if such news may do harm to Italy's credit or prestige, furthermore, whoever develops an activity prejudicial to the national interests; such a person is to be tried by special Courts and, failing to appear before them, in spite of having been summoned, he shall be deprived of his Italian natonality.

Guiseppe Nitti[3] points out with regard to these Decrees: "L'exemple ne peut être que mauvais et on peut craindre que ces mesures soient adoptées ou imitées par d'autres régimes pour devenir une arme terrible de perscéution politique" (Translation: The example cannot be but a bad one and we may expect that such measures might be adopted or imitated by other regimes and are bound to serve as a terrible weapon of political persecution.)

(*c*) A *German* Law of 14th July, 1933, provides for individual expatriation if a person, although summoned to return to the Reich, does not return, or if a person living abroad violates by his conduct his duty of allegiance towards Reich and people.

[2] "Denationalization," in the *British Year Book of International Law*, VIII, 1927, pp. 45 to 61.

[3] "La situation juridique des émigrés Italiens en France," *Revue Générale de Droit International Public*, 1929, 36*e anée*, p. 738 *seqq.*

(*d*) Whereas the Laws mentioned above were based on political grounds and could to a certain degree be explained by requirements of public order and of security of the State, a *German Order of 25th November*, 1941,[4]—hereinafter referred to as "the Order" or "the German Order"—goes much farther by denationalizing all Jews living abroad, irrespective of their political or other conduct, or behaviour. I propose to deal in the following lines with this Order first from the view of its *construction* and then from its *international* aspects.[5]

II. The German Order of 25th November, 1941

1. *Construction of the Order*

Section 1 of the Order provides that a Jew whose ordinary residence ("gewoehnlicher Aufenthalt") is situate abroad—the Order does not contemplate only enemy territories—cannot be a German national.

(*a*) As stated in the introduction to the Order, it is issued under section 3 of the Citizens of the Reich's Law ("Reichsbuergergesetz"), enacted at Nuremberg on 15th September, 1935, and, therefore, the definition of the notion "Jew" has to be taken from the "First Order" issued under that Law, i.e. the Order of 14th November, 1935. Thereafter, every person is considered to be a Jew who is a descendant of at least three grandparents of the Jewish race; under certain conditions descent from two grandparents of the Jewish race suffices to treat a person as a Jew in the sense of the Order; the profession of the Jewish faith by a grandparent is considered a presumption of his Jewish race.

(*b*) The Order states that a person has his *ordinary residence* abroad if he is staying abroad under circumstances showing that his stay is not merely a temporary one. Does an involuntary abode abroad fall within the scope of the Order? Persons who have emigrated from Germany are to be considered ordinarily residing abroad because, from the legal point of view, their stay is a voluntary one, even although very frequently caused by pressure and carried out under duress. But what about persons expelled or deported from Germany? Mr. *Wolff* assumes that such an abode is not a residence in the true meaning of this notion, because it cannot be said that such a person has his "ordinary residence" in the country into which he has been taken by force. This opinion is in accordance with the point of view taken up by the Anglo-German Mixed Arbitral Tribunal in *re Cloes* and *Chota Nagpur* Co-operative Society (*Recueil* des Décisions des Tribunaux Arbitraux Mixtes, vol. 4, p. 13: "Residence implies the notion of voluntary residence"). A notice in *The Jewish Chronicle* of 10th April, 1942, however, to which I shall refer once again later (paragraph (*c*)), seems to justify Mr. *Kauffmann*'s as well as Mr. *Wolff*'s scepticism whether the German authorities will be prepared to accept this point of view.

The reason for which residence has been taken abroad is immaterial. The deprivation of nationality is not restricted to emigrations in connection with the events of the last few years, but concerns also people of German

[4] *Vide* Ernst Wolff, "Die Ausbuergerung der Juden," *Die Zeitung*, 20th February, 1942; Alfred Kauffmann, "Denationalization and Expropriation," *The Law Journal*, 21st March, 1942; Paul Abel, "The new German Denationalization Law," *Free Austria*, April, 1942.

[5] The provisos of the German Order, as far as they relate to the confiscation of property as a consequence of the deprivation of nationality, cannot be dealt with in this article owing to lack of space.

nationality who have been living outside their home country for many years. The denationalization takes place irrespective of the country from which emigration has been effected, and comprises people of German nationality too who have never lived in Germany.

(*c*) The conception "*abroad*" requires some attention. The countries occupied—but not annexed—by Germany are foreign countries in the sense of the Order, because under the established rules of international law[6] occupation does not effect a change of sovereignty; individuals who have emigrated from Germany to e.g. Belgium, Holland, Norway, etc., are, therefore, residing abroad in the meaning of the Order. Bohemia and Moravia are occupied territories just as well as the German occupied part of Poland. Jewish persons of German nationality residing in this part of Poland seem, therefore, to fall within the scope of the Order.[7] Somewhat doubtful is the situation with regard to the "Protectorate Bohemia and Moravia." Section 12 of the Order states that it applies also in the "Protectorate Bohemia and Moravia" (and in the incorporated Eastern territories). The bearing of this clause is obscure. It might signify that these territories are not considered to be foreign countries ("Ausland") in the sense of the Order. In this case, persons who had left, e.g. Austria, after her annexation by Germany and have thereafter settled down, say, at Prague—a case which has happened rather frequently—are not deprived of their German nationality. It must, however, not be overlooked that the Order concerns only persons of German nationality so that persons e.g. of Czech nationality who have left their home country in consequence of the events of the last few years are not touched by the Order.

If a forced abode in Poland owing to deportation to that country could constitute ordinary residence in such territory (paragraph (*b*) above), the consequence of such deportation would be, *inter alia*, the loss of the German nationality—coupled with the confiscation of property; the notice mentioned above (paragraph (*b*)) seems to confirm it as the practice adopted by the German authorities.

(*d*) The Order contains no ruling with regard to the legal status of the *wife* and the *children* of the persons concerned. *Wolff* rightly submits that the loss of German nationality extends to the—non-divorced—wife and to the minor children of the *émigré* who have left Germany as well, unless they are non-Jewish, but that it has no bearing on the—Jewish or non-Jewish—wife or children left behind and living in Germany. It goes without saying that the non-Jewish husband who has emigrated from Germany with his Jewish wife retains his German nationality of which his wife is deprived.

(*e*) Under section 2 of the Order, the denationalization takes *effect* from the day of the coming into force of the Order in so far as the ordinary residence existed abroad already on that date, and in the case of subsequent

[6] Compare *inter alios* Foote, *A Concise Treatise on Private International Law*, 5th Edition, by Bellot, 1925, p. 9; Oppenheim, *International Law, a Treatise*, 6th edition, by Lauterpacht, 1940, vol. 2, § 166, p. 338; Hall, *International Law*, p. 553 *seqq.*; McNair, "Municipal Effects of Belligerent Occupation," *The Law Quarterly Review*, January, 1941, p. 34; Hofmannsthal-Berger, "International Protection of Victims and Revindication of their Property Rights," *Contemporary Law Pamphlets*, New York, 1942, Ser. 5, No. 5, p. 1, note 1.

[7] After due consideration, I arrived at the conclusion that the opinion expressed by me in the article in *Free Austria* with regard to the legal status of persons who have emigrated from Germany to the "General Government of Poland" has to be abandoned.

emigration, from the date of the transfer of the ordinary residence to a foreign country.

(*f*) The loss of nationality takes place *ipso jure, ex lege*. Contrary to the Law of 14th July, 1933 (*vide* Chapter I, paragraph 2, (*c*) above), no individual decree or statement is required. The Order (section 8) provides for individual decrees, to be issued by the Chief of the Security Police, only with regard to the question as to whether the conditions of confiscation of property are given, and not with regard to the deprivation of nationality, although the conditions on the two measures are quite the same, and confiscation as well as denationalization are incurred *ipso jure*.

2. *The Order in its International Aspects*

(A) *Wolff* raises the interesting question of the *validity* of the Order from the standpoint of *German* law. As mentioned above (paragraph 1 (*a*)), the Order is based on the Citizen of the Reich's Law of 15th September, 1935, which has defined the legal status of the German Jews as "nationals" in contrast to "citizens" ("Reichsbuerger") and which has authorised the Minister of the Interior to enact Orders carrying out or supplementing the Law. *Wolff* submits that the Order of 25th November, 1941, exceeds these limits completely, in depriving the persons concerned of their nationality which had been expressly left them by the Law of 15th September, 1935, and in introducing confiscation of property, so that he considers the Order invalid even under German law. There is of course no doubt that the Order will be treated as valid in Germany and that, therefore, from the German point of view, the link between Germany and the persons to whom the Order applies, is severed by this act of legislation.

Can the validity of the Order be challenged on this ground before a *British* Court? The question whether and, if at all, under which circumstances the validity of a legislative act of a foreign Power can be examined in this country has been thoroughly discussed in the King's Bench Division *in re Amand*.[8] The applicant, a Netherlands subject who had resided in England for a number of years, had been called up for service in the Netherlands army in this country under a Decree of the Queen of the Netherlands, issued in this country on 8th August, 1940. In the course of an application for a writ of *habeas cogpus* the applicant contended that the Royal Decree of 8th August, 1940, was illegal and unenforceable under English and invalid by Netherlands law. The Court refused the writ. Examining the question of validity by Netherlands law, the Court (*Wrottesley, Croom-Johnson* and *Cassels*, JJ.) referred to the statement of *Warrington*, L.J., in *A. M. Luther* v. *James Sagor & Co.*,[9] that "it is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be

[8] 19th January to 30th, 1942, (1942) 1 All E.R. 236; the appeal against this Order of the Divisional Court of the King's Bench was dismissed by the Court of Appeal on the ground that the Order was made in a criminal case and the Court of Appeal had, therefore, no jurisdiction to hear the appeal (58 L.T.R. 195); The House of Lords dismissed the appeal against this decision on 21st July, 1942. *vide The Times* Law Report, 22nd July and 7th August, 1942, and 58 L.T.R., p. 382. McNair, *l.c.* (note 6) submits (pp. 69, 70, and note 34) "that the rule which prevents an English Court from sitting in judgment upon the validity, i.e. the substantial validity, of the acts of a foreign sovereign State, done within its own territory, does not mean that it cannot make inquiry as to the formal validity of these acts and their legal nature."

[9] (1921) 3 K.B. 532.

questioned in the courts of this country," and to a similar dictum in *Paley* (*Princess Olga*) v. *Weisz*.[10] But the Court came to the conclusion that, under the exceptional circumstances of the case, it had to enter upon the inquiry whether the Royal Decree of the Queen of the Netherlands was valid by Netherlands law, *inter alia*, because the reasons given in the judgments referred to do not apply "to an act of a foreign country which deals with the personal freedom of a person living in England within the protection of the Crown" (*Wrottesley*, J.). "I am impressed," said *Cassels*, J., "by the fact that the Netherlands Courts no longer function. The applicant cannot apply for redress in his own courts," an argument mentioned by *Croom-Johnson*, J., too ("The ordinary Netherlands Courts are not available to the applicant"), who referred *inter alia* to the "most unusual circumstances" of the case. The Court arrived after thorough examination at the conclusion that the Royal Decree was valid under Netherlands law.

It is left to the Courts in this country to decide as to whether the exceptional circumstances which have led to the result that the validity of the Royal Decree concerned was to be examined under Netherlands law, prevail also with regard to the question of the validity of the German Order of 25th November, 1941, under the law of Germany.

(B) Provided the Order has to be treated as valid under German law, a question of great practical importance has to be faced as to whether the *other* States and particularly *Great Britain* are bound to consider the Order the basis for determining the legal status of the individuals concerned, residing within their frontiers, so that those individuals are to be treated as *stateless* in consequence of the deprivation of their German nationality.[11]

It rests with the Courts of each State to decide this question under its municipal law, but it might not seem out of place to discuss the points of view which might be taken into consideration, particularly with regard to the views taken by the authorities in connection with similar regulations enacted by several States previously to the Order now under consideration (*vide* Chapter I, above).

(*a*) It is an established rule of international law that it is at present left to the discretion of *each* State to determine on which grounds nationality is acquired and on which grounds it is lost and that, therefore, persons who have been deprived of their nationality by their home country under its municipal law are to be held also by the other States as being no longer nationals of that State. *Bluntschli* has already taken up the standpoint that the question of nationality is one of internal organization and of the constitutional law of every State. This principle has been stressed by many other authorities on international law. It might suffice to refer to

[10] (1929) 1 K.B. 718. The same principle was stressed as early as 1888 in *re Peru Republic* v. *Dreyfuss Brothers & Co.* (1888, 38 Ch. D. 348) and later on by Maugham, J., *In re Russian Bank for Foreign Trade* (1933), Ch. 745, particularly p. 766.

[11] It was held by Russell, J., *In re Stoeck* v. *Public Trustee* (1921, 2 Ch. 67; 37 (1921) L.T.R. 666) that a person, although having lost his nationality under the law of his home country might be treated by other states as still being a national of that country; His Lordship said: "Whether a person was a national of any country must be decided by the municipal law of that country. It might be said that a person was to be 'deemed to be' or 'treated as' a national of another country, but he could not be made such a national." That, as a rule, the municipal law is decisive, was expressed also in *Re Chamberlain's Settlement* (1921), 2 Ch. 533.

Oppenheim[12] and to *Lauterpacht*;[13] the latter puts this principle as follows: "Matters of nationality are, subject to the international obligations of the State, left to its municipal law. A State may not only lay down rules concerning the acquisition of nationality. It may also deprive its subjects of their nationality in a variety of ways."

Nearly all writers on these matters consider this state of affairs highly deplorable. "The matter of nationality," writes *Garner*,[14] "has acquired in recent years an international importance which was formerly unknown. . . . It would be a great gain if in the place of these conflicting national laws we could have a uniform law in the form of an international convention, prescribing the conditions under which nationality may be acquired and under which it shall be lost. This would remove the source of international controversies which arise with necessary frequency in respect of dual nationality and the 'heimatlos' status." At the Stockholm meeting of the *International Law Association*, 1924,[15] a resolution was adopted that a national should not be deprived of his nationality and "that nationality should only be lost as the effect of the acquisition of another nationality." The *Institut de Droit International* recommended at its session of Stockholm, 1928, on *Sir Cecil Hurst*'s motion, the principle: "Nul ne peut perdre sa nationalité sans acquérir une nationalité étrangère."[16] (Translation: Nobody can lose his nationality without acquiring another one.)

This view was shared also by the *Conference for the Codification of International Law*, held at the Hague, March–April, 1930. It might not be without interest to remember the words used by the German delegate to the Conference, Mr. *Hering*: "Governments should endeavour to remove the causes of statelessness. . . . The Conference should first of all consider to eliminate cases of statelessness."[17] The Conference adopted unanimously a "Convention on certain questions relating to the conflict of nationality laws," dated 12th April, 1930, which has been signed and later on ratified (6th April, 1934) on behalf of His Majesty (Cmd. 4347). Its articles 1 and 2 read as follows: Art. 1: "It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality." Art. 2: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State." Moreover, the Conference expressed unanimously the recommendation "that it is very desirable that States should . . . make every effort to reduce so far as possible cases of statelessness."[18]

[12] *L.c.* (note 6), 5th edition, edited by Lauterpacht, 1937, vol. 1, § 302, p. 521. In the same sense Frankenstein, *Internationales Privatrecht*, vol. 1, 1926, pp. 85–6.

[13] *The Function of Law in the International Community*," 1933, § 21, p. 300 *seqq.*

[14] *Recent Developments in International Law*, 1925, p. 30.

[15] *Report of the 33rd Conference*, held at Stockholm, September, 1924, p 32.

[16] *Annuaire de l'Institut de Droit International*, 1928, p. 688. It is worth mentioning that Martitz ("Das Recht der Staatsangehoerigkeit im internationalen Verkehr," in the *Annalen des deutschen Rechts*, 1875, p. 800) considered—although wrongly—as early as 1875, this desideratum as a rule of international law, in force at that time!

[17] "Acts of the Conference for the Codification of International Law," *Meetings of the Committees*, vol. 2: *Minutes of the First Committee, Nationality, Society of League of Nations' Publications*, V, *Legal*, 1930, V. 15, pp. 170 and 250.

[18] *League of Nations Official Journal*, p. 846 *seqq.* and 913.

The happenings of the last few years have proved that the points of view which have led the Conference were far from being observed by some of the States signatories to the Convention. *Kuhn*[19] was right in saying that "recognition of the principle that it is a breach of international comity for a State to deprive the citizens of national status unless another nationality is acquired, may not come as speedily as many would wish."

In any case, the fact cannot be denied that statelessness exists, that it occurs much more frequently nowadays than before, and that statelessness is recognized by the municipal laws of many States and—although not without some hesitation—in this country too.[20]

(*b*) Some authorities deduct from the principle as stated in the foregoing paragraph (*a*) that even indiscriminate mass-denationalization, although it might be contrary to moral principles, does not violate international law, but that the States remain bound to *receive back* their former nationals who have not acquired another nationality, because no State is permitted to impose duties upon other States by unilateral action. Sir *John Fischer Williams*[21] holds the view "that while positive international law does not forbid a State unilaterally to sever the relationship of nationality so far as the individual is concerned, even if the person affected possesses or acquires no other nationality, still a State cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other States, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the State where he happens to be." This standpoint is in agreement with the statement made by the British Delegate at the Conference at Hague, Mr. *Dawson*:[22] "If the State whose nationality a person possesses arbitrarily deprives him of that nationality, it seems only right and reasonable that the principle should be recognized that the obligation to receive back survives, notwithstanding that the nationality has been technically brought to an end." According to this view, not denationalization, even on whatever a large scale, violates international law, but the expulsion of the own nationals or ex-nationals, and the refusal to receive such individuals back from abroad.[23]

(*c*) Other writers submit that not only expulsion of ex-nationals (and, of course, nationals as well) and refusal to take them back, but *indiscriminate denationalization* itself, all the more so if coupled with the refusal to take them back, constitutes an offence against international law. Most of these authorities use as the main argument that such an expatriation is an "*abuse of rights*," effecting the unlawfulness of an act, not prohibited "*per se*." *Politis*[24] is of the opinion that "il y aura responsabilité inter-

[19] *The American Journal of International Law*, 1936, p. 498.

[20] *Vide* Russell, J., in *Re Stoeck* v. *Public Trustees*, quoted above (note 11): "A stateless person is not unknown to English law." Compare *inter alios* Dicey, *A Digest on the law of England with reference to the Conflict of Laws*, 5th edition, edited by Keith, 1932, p. 142; Westlake, *A Treatise on Private International Law*, 1922, p. 366; Wheaton's *Elements of International Law*, 6th edition, edited by Keith, vol. 1, 1929, p. 518.

[21] *L.c.* (above note 2).

[22] *Acts*, quoted above (note 17), p. 244.

[23] Compare Lessing, "Das Recht der Staatsangehoerigkeit und die Aberkennung der Staatsangehoerigkeit zu Straf- und Sicherungszwecken," *Lugdunum Batavorum* (Leyden), 1937, pp. 75, 76, 114, 115 and *passim*.

[24] "Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus des Droits dans les rapports internationaux," Académie de Droit international, *Recueil des Cours*, 1925, vol. 6, p. 5 *seqq*, 86 and *passim*.

nationale si l'usage apparement légal d'une liberté a eu lieu pour des motifs blâmables, c'est à dire pour un but autre que celui dans lequel le droit international a conferé la liberté en question." (Translation: There will be international responsibility if the apparently lawful use of a liberty has been exercised for reasons to be blamed, i.e. for another purpose than that for which the liberty concerned had been conferred by international law.) *Leibholz*[25] considers the interdiction of *arbitrary* acts (abuse of rights) a principle of international law which may be violated by indiscriminate expatriation as punishment or for political reasons. "The conferment and deprivation of nationality," says *Oppenheim*,[26] "is a right which International Law recognizes as being within the exclusive competence of States, but it is a right the abuse of which may be a ground for an international claim." *Lauterpacht*[27] submits "that the indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal."[28]

(*d*) In the opinion of the writers quoted in the foregoing paragraph, indiscriminate (arbitrary) deprivation of nationality is or may be a violation of international law constituting international liability, but they do not go so far as to argue that such denationalization measures are themselves ineffective in third States; subjects of international law, they argue, are States and not individuals so that the latter cannot derive claims from the violation of international law by a State. This was the main argument used by the *Swiss* Federal Court[29] in a case in which the status of a child was at issue whose father had lost his Russian nationality under the Decrees of the U.S.S.R. (mentioned above, Chapter I, paragraph 2 (*a*)) whereas his mother had retained her Swiss citizenship. Under Swiss law, children by a marriage of a Swiss woman with a stateless man are considered Swiss citizens. The authorities of the mother's native town Bonfol, Switzerland, refused to acknowledge the child as a Swiss, arguing that the Decrees of the U.S.S.R. concerned were invalid because a State was not entitled to denationalize unpopular citizens, and the child's father was, therefore, to be considered a Russian subject. The Federal Court allowed the appeal from this decision, because even if the Decrees concerned were contrary to the Law of Nations this would mean a violation of the duties of one State towards the other States, but would not change the statelessness of the individual as concerned by such Decrees. The opposite view

[25] "Das Verbot der Willküer und des Ermessensmissbrauches im völkerrechtlichen Verkehr der Staaten," in *Zeitschrift für ausländisches öffentliches und Völkerrecht*, 1928, p. 4 *seqq.*, 25, 46.

[26] *L.c.* (note 6), vol. I, § 155*a*, p. 280.

[27] *L.c.* (note 13), p. 300.

[28] Lessing, *l.c.* (note 23), p. 84 *seqq.*, contests the existence of a rule of international law forbidding arbitrary acts or abuse or rights; to his mind, abuse of rights is unlawful in international relations only if the purpose of the measure in question was no other but to do harm to other States which, as he admits, can never happen in nationality matters. He submits that the doctrine objected to by him tries to convert moral principles of that what ought to be done into legal norms; but he does not seem to deny (p. 92) that the practice of international law does not share his point of view. The wording of Article 1 of the Hague Convention, 1930 (*vide* above, before note 18) proves that interdiction of the abuse of rights in nationality matters is not strange to authorities in the field of international law.

[29] *Re Lempert* v. *Bonfol*, 15th June, 1934, *Reports of Decisions*, vol. 60, 1st Part, p. 67 *seqq.*

was upheld by the *French* Courts with regard to the Russian *émigrés* before the formal recognition of the U.S.S.R. by France (28th October, 1924); they refused to give effect to the Russian Decrees as "measures violating the Law of Nations" and treated the Russian *émigrés* who had settled down in France as Russian nationals.[30] After October, 1924, the French authorities considered the Russian *émigrés* to be stateless. A circular letter of the Garde des Sceaux of 28th April, 1925, instructed the French authorities to consider those refugees to be stateless and subjected in questions of status to French law as *lex domicilii*; the Tribunal de la Seine adhered to this standpoint in its decision of 7th March, 1929.[31]

A similar change in the treatment of the Russian *émigrés* occurred in Germany.[32]

The Italian *émigrés* had been treated in France as well as in other countries from the beginning as stateless.[33]

(*e*) Some writers take up the view that cancellation of nationality can have no effect abroad unless the person concerned has *agreed* to it.[34] The now prevailing doctrine, however, takes the view that conferment of nationality does not root in a contract between the State and the individual, but in an unilateral act of the State, and the same is true of deprivation of nationality. "The tie of allegiance," says *Foote*,[35] "though spoken of by *Coke* as 'duplex et reciprocum ligamen' . . . has always been regarded as capable of dissolution by the will of the Sovereign."

(*f*) The aim of this paper is to show which opinions have so far been expressed from the international legal standpoint on the problem of denationalization, either in general or as regards the acts of legislation which were the forerunners of the German Order of 25th November, 1941. The moral point of view and—very desirable—future developments of international law were purposely left out of consideration.

Some arguments may be gained from these opinions for the solution of the intricate question as to the influence of the German Order upon the status of the refugees residing in this country to whom the Order applies. As stated above, many authorities hold mass-deprivation of nationality unlawful if the State refuses to receive back those of its ex-nationals who have not acquired another nationality and who are not permitted to stay in the country of their abode. If returning ex-nationals are received back, but are interned, this can, of course, not be considered as a fulfilment of this international duty. The fact that the attitude of Germany in this respect cannot be ascertained for the time being, may be of some importance in deciding the question of the legal status of the refugees concerned, although

[30] Compare the decision of the Court of Appeal at Paris as quoted by Leibholz (*vide* note 25), p. 26, from the *Revue critique de Législation et Jurisprudence*, 1926, vol. 46, p. 470.

[31] *Vide* the following essays published in the *Journal du Droit International* (Clunet) (*a*) as to the attitude before the recognition: "La Révolution bolchévique et le statut juridique des Russes," the French standpoint expounded by Grouber and Tager, the British point of view by Idelson, and the German one by Freund, 1924, pp. 5, 29, and 51 *seqq*. (*b*) As to the attitude after the recognition: Prudhomme, "La reconnaissance en France du Gouvernment des Sovjets et ses conséquences juridiques," 1925, p. 318 *seqq*.; Tager, 1925, p. 547 *seqq*.; Schaftel, "L'Apatridie des réfugiés Russes," 1934, p. 36 *seqq*. Compare also Delchelle, *La situation juridique des Russes en France*, 1926.

[32] *Journal du Droit International* (Clunet), 1925, p. 351 *seqq*.

[33] *Vide* Nitti, *l.c.* (note 3, above).

[34] Compare *inter alios* Hofmannsthal-Berger, l.c. (note 6, above), pp. 5–6.

[35] *L.c.* (note 6, above), p. 9.

it is sure that such a case will never happen, the question, therefore, being merely a question of principle. But it must not be overlooked that if mass-denationalization violates international law, it is very doubtful whether such a violation effects the invalidity of the denationalization measures themselves in relation to the persons concerned, because under the—unfortunately—still prevailing doctrine subjects of international law are States, and not individuals. Another argument, however, leading to the inapplicability of the German Order, may be derived from the attitude of the French authorities towards the Russian refugees before the recognition of the U.S.S.R., as stated above (before and in notes 30 and 31). It may be argued that the existence of a state of war with a foreign country has similar effects as the non-recognition of such a Power, in so far as the applicability of its war-legislation is involved. It is interesting to note the standpoint taken up by the United States District Court, New York (Federal Judge *Henry W. Goddard*), in deciding on an application of a German refugee for a writ of *habeas corpus*, based on the allegation that his internment under the U.S. Enemy Aliens legislation was unlawful because he was to be considered stateless in consequence of the German Order of 25th November, 1941. The application was dismissed; the Court ruled that it could not be incumbent on U.S. Courts to set Germans who have been interned free merely because Germany had passed a law depriving German refugees of their nationality.[36] The same considerations are expressed in the statement made by the Home Secretary, Mr. *Morrison*, in the Commons on 30th July, 1942, that "it would be contrary to public policy to recognize the power of an enemy State by its legislation in time of war to relieve persons who were its nationals at the outbreak of war from any disabilities, liabilities, or restrictions imposed by our law on aliens of enemy nationality."[37]

The refusal to recognize the German Order may also be based on *Dicey*,[38] who laid down the principle that British Courts will not "give any effect in England to disabilities arising from religious vows, from caste, from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicil) or from "civil death" or "infamy."

But, on the other hand, can persons be treated as German nationals although the two elements which have been considered for centuries the

[36] 12th May, 1942, *re Paul B. Schwarzkopf* v. *Byron H. Uhl* (Commissioner of Immigration in New York), published in the *New York Times* on 13th May, 1942. A different opinion is expressed by Rosenberg in an article "Aliens-Friends and Enemies" in the "*Contemporary Jewish Record*," June, 1942, p. 282.

[37] *Parliamentary Debates, House of Commons*, vol. 382, No. 96, cols. 707–8. Vide Kauffmann's construction of this statement in *Die Zeitung*, 18th September, 1942.

[38] *L.c.* (note 20, above), p. 534. Compare also the decision of the Court of Appeal in *Kaufmann* v. *Gerson* (1904) 1 K.B. 591, where it was held that an English Court would not enforce a foreign contract, though valid by the law of the country in which it was made, in cases where the Court deems the contract to be in contravention of some essential principle of justice and morality. That the same principle applies to foreign laws too, was stressed e.g. by Foote, *l.c.* (note 6, above), p. 657. In the Russian cases, cited in notes 9 and 10, above, the Court gave effect to the Soviet confiscatory legislation—although this legislation was considered contrary to essential principles of British law—because property situate or transactions carried out within the territory of the U.S.S.R. were concerned. Warrington, L.J., pointed out in the leading case, *A. M. Luther* v. *James Sagor & Co.*—referred to above (note 9)—that the applicability of this Soviet legislation had to take place only "in relation to property and persons within its jurisdiction."

essence of nationality, viz. duty of allegiance and right to protection,[39] do no more exist under the laws enacted by Germany with regard to the persons to whom the Order of 25th November, 1941, applies?

Should the refugees concerned be considered to be *stateless* in this country, the restrictions imposed on enemy aliens by the Aliens Order, 1920, as amended, would remain applicable just the same, because section 21 (1) of this Order expressly provides that "where an alien acquired a nationality at birth he shall . . . be deemed to retain that nationality unless he has subsequently acquired by naturalization or otherwise some other nationality, and is still recognized by the Sovereign or State whose nationality he has acquired as entitled to protection." But in many other respects, the situation of stateless persons differs from that of enemy aliens, for instance: Aliens and, therefore, also stateless persons,[40] are entitled to *habeas corpus*, whereas enemy aliens are not entitled to this benefit.[41] Under section 10 (2) of the British Nationality and Status of Aliens Act, 1914, as amended up to 1933, a woman who has "married an alien, and was at the time of her marriage a British subject, shall not, by reason only of her marriage, be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband." Hence, a British-born woman marrying a Jewish refugee of German origin remains a British subject, if the husband is considered stateless in this country.[42] The Trading with the Enemy Act, 1939, and the Custodian Order, 1939, contain provisions which apply to enemy subjects, but not to stateless persons. The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, imposes restrictions on patents, etc., owned by enemies and enemy subjects; such rights if owned by stateless persons are not concerned by this Act.

The problem dealt with in this paper is, therefore, of practical importance in many respects.

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[39] Compare *Calvin's Case* (1608), 2 St. Tr. 585.

[40] Compare *re Stoeck* v. *Public Trustee* (note 11, above): "It would appear that a 'stateless person' might be an alien" (Russell, J.).

[41] *Vide* Dicey, *l.c.* (note 20, above), pp. 215 and 906, and Dicey, *Introduction to the Study of the Law of the Constitution*, p. 220. *R.* v. *Vine Street Police Superintendent*, ex parte *Liebmann* (1916), 1 K.B. 268; *R.* v. *Knockaloe Camp Commandant*, ex parte *Forman* (1917), 87, L.J. 43.

[42] *Vide* Kauffmann, *l.c.* (above note 4) who quotes another instance where the statelessness of persons affected by the Order becomes relevant, viz. the determination of the law of succession when such persons die resident outside Great Britain.

STATUTES

The U.S.A. Visiting Forces Act, 1942

A year ago or more the Prime Minister spoke of Great Britain and America getting "mixed up" together. Since then the mixing up has been rapidly increased not only in the military but in the whole economic and production field. Now it is being extended to the legal field. It was obvious that the movement to the United Kingdom of large American military, naval, and air forces would involve special arrangements for jurisdiction over the members of those forces, just as the movement of the

British and American armies to France in the last war led to the establishment of British and American tribunals to deal with the men overseas. A general provision for the jurisdiction of Allied Governments, in accordance with their military law, over their soldiers and sailors in this country was made by the Allied Forces Act, 1940, which, in turn, provided for the application to these foreign forces of a number of the clauses in an Act passed in 1933 concerning British Commonwealth forces that might be stationed in the United Kingdom. (The Visiting Forces British Commonwealth Act). The root of title, therefore, for the military tribunals of the Commonwealth, the other Allies, and, lastly, the United States military authorities is the Act of 1933.

There is a much older principle of international law of which that Act is an application.[1] It goes back to Bartolus, who laid down that, where a ruler has power over certain persons, although he has not a territory, he is said to have the territory in respect of those persons. A modern authority on international law has thus summarised the position with regard to the armed forces of an ally on foreign territory: "Whenever armed forces are on foreign territory in the service of their home State, they are considered extra-territorial and remain under its jurisdiction. A crime committed on foreign territory by a member of those forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty." (Oppenheim, Ed. Lauterpacht, *International Law*, Vol. I, section 445.)

The Act of 1933 is applied by the Allied Forces Act of 1940, of which Section 1, sub-section 3, empowers H.M. by an Order in Council to extend its provisions to any Allied Force, subject to any adaptations and exceptions as may be provided by the Order. In every case the application of the Act is dependent on a treaty or agreement made between H.M.G. and the Allied Government concerned. An example which may serve for the rest is the British-Czecho-Slovak Military Treaty of October 1940, which lays down that jurisdiction in matters of discipline and internal administration over members of the Czecho-Slovak Land Forces in the United Kingdom shall be exercised in accordance with Czecho-Slovak Military Law, and offences against discipline shall be tried and punished accordingly by Czech Military Courts and authorities. Then follow two large limitations: The offences of murder, manslaughter and rape shall be tried only in the civil Courts of the United Kingdom; acts and omissions constituting an offence against the Law of the U.K., other than murder, manslaughter, and rape, shall be liable to be tried by civil Courts in the U.K. The effect of these provisions is that British Courts have exclusive jurisdiction over the most serious criminal acts of members of the Forces; the Czecho-Slovak Courts have exclusive jurisdiction over matters of discipline and internal administration which are not, at the same time, offences against British civil law; and the British and Czecho-Slovak Courts have concurrent jurisdiction over acts or omissions other than the most serious crimes which are offences against British Law and also offences against discipline.

A provision of the Act of 1933 which is not applied in the other Act

[1] I am under great obligation to an article in the *Czecho-Slovak Year Book of International Law* on the "Jurisdiction over Allied Forces in Britain" for the historical part of the note.

defines a member of a Visiting Forces to include any person who is subject to the Military, Naval or Air Force Law of the Dominion, and who, being a civilian employed in connection with the Visiting Forces, entered into his engagement outside the United Kingdom. But in the Order applying the Allied Forces Act "member" excludes a person who is not serving in the Armed Forces of the Allied Power. In other words—civilians are not to be considered as members of the Allied Forces for the purpose of their military jurisdiction. It was, however, laid down in the much debated case of *re Amand*, the Dutchman who was convicted of desertion by a Netherlands Military Court in England, that the question whether an individual was a member of an Allied Force depends on the Law of the State concerned. The purpose of the latest legislation about U.S. Forces is to remove the limitations both as to matter and as to persons.

Before the passing of the U.S.A. (Visiting Forces) Act, an Order in Council had been made applying the Visiting Forces Act of 1933 to the American Forces in this country. That Order deals with the machinery for the conduct of Service Courts of the U.S.A. and the enforcement of their decisions; and enables Government Departments to act towards American Forces in the same way as they act towards British Forces, and to carry out imprisonment or detention of American members of the Forces in the U.K. But the exception to the jurisdiction of the Service Courts, that any civil Court of the U.K. could try a member of the Visiting Force for anything constituting an offence against British Law, limited the powers of the American Military Courts as of the other Allies. It is the object of the agreement made between H.M.G. and the Government of the U.S.A. in July, 1942, to give full and exclusive jurisdiction to the American Military Courts over all acts or omissions by members of the Forces which are regarded by American Military Law as offences against discipline, and also to widen the class of persons over whom these Courts may exercise their jurisdiction. The Act is an example of legislation by reference to an annexe. The schedule sets out in full the notes exchanged between the two Governments. A letter addressed by the Foreign Secretary to the American Ambassador states the desire to give effect to the request of the Government of the U.S.A. that their Service Courts and authorities should, during the continuance of the conflict against the common enemy, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces. At the same time liberty is given to the Americans to ask that in any particular case the British authority should exercise its jurisdiction over a member of the Force where he is charged with an offence against British Law. To meet any misgivings of the British public, certain proposals are set out which the American Ambassador accepted: (1) That American Courts will be able and willing to try, and, on conviction, to punish, all criminal offences which members of the Forces may be alleged to have committed, and that their authorities will investigate any alleged offences committed by members of the Forces which may be brought to their notice by competent British authorities. (2) That the trial of offences against a member of the civilian population shall be in open Court except where security considerations forbid it, and will take place promptly and within reasonable distance from the spot where the offence was alleged to have been committed. (3) That jurisdiction should be exercised only for an offence committed after the date at which the U.S.A. entered the war. (4) That without any binding undertaking the U.S.A. will be ready to take

all steps in their power to ensure to the British Forces who may be serving in America a position corresponding to that of American Forces in the United Kingdom. There are further proposals for mutual assistance between the U.K. and the U.S.A. Government as regards the preliminary action to be taken in trials where the witnesses or other persons from whom it is desired to take statements are not members of the American Forces; and, conversely, for the assistance of the American authorities where persons who are not members of those Forces are prosecuted before British Courts and the evidence of a member of the American Forces is required. Lastly the note provides for the extension of the necessary legislation to British colonies and dependencies other than those territories in which military and naval bases leased to the U.S.A. are situated—the question of jurisdiction in those places being already regulated specifically. The American Ambassador, in accepting all the conditions in the note of the Foreign Secretary, concluded that the exchange of notes was to be regarded as an agreement to which effect would be given by Parliamentary legislation.

The articles of the Act prescribe that no criminal proceedings shall be instituted in the United Kingdom against a member of the Military or Naval Forces of the U.S.A.—it is notable that this includes members of the Air Force, which in the American system is part of the Military and Naval forces. A saving clause is added to allow for British jurisdiction in any particular case where representations to that effect are made on behalf of the Government of the U.S.A. And it is further provided that the exclusive jurisdiction of the American Court shall not affect any powers of arrest, search, or custody exercisable under British law with respect to offences committed against that law. But where a person has been arrested and cannot be prosecuted before a British Court, he is to be delivered into the custody of the Americans.

Article 2 introduces the wide definition of member of the American Forces to cover persons who are by the law of the U.S.A. at the time being subject to the military or naval law, except that no person employed in connection with the Forces who is not a citizen or national of the U.S.A. shall be deemed to be a member, unless he entered into that employment outside the United Kingdom. That clause reproduces the provision in the Commonwealth Visiting Forces Act. In order to avoid troublesome questions of evidence it is stipulated that a certificate issued by an American authority stating that the person named is or was subject to the military or naval law of the U.S.A. shall be conclusive evidence of that fact; and a certificate relating to a person bearing the name in which a party is charged shall, unless the contrary is proved, be deemed to relate to that party. Lastly, any document signed by a person purporting to be an authority shall be received in evidence and accepted as a proper certificate. That clause gives the same force to a document emanating from an American authority as is accorded in our Courts to a document emanating from the Foreign Office in regard to the status of British officials abroad. A final clause provides for the application of the Act to colonies and mandated territories.

In the Debate on the Bill in Parliament one point which did not appear to be completely covered was as to the position if a private individual in this country initiated proceedings of a criminal nature against a member of the American Forces by applying for the issue of a summons. Presumably, however, the British magistrate, in view of the terms of the Act,

would refuse to issue the summons in such a case and report the matter to the American authorities. Some apprehension was expressed whether a serious offence affecting British subjects committed by members of the Forces would be adequately punished by American Law. That apprehension was shown to be unwarranted. The American Military Law deals with greater severity than the English Law with the offence of rape, for which the penalty is death or imprisonment for life, and the penalty for robbery is ten years' imprisonment, for voluntary manslaughter in heat of passion also ten years. A general American Court Martial, which is composed of not fewer than five officers, is required for any offence punishable with more than six months' imprisonment. A special Court Martial of not less than three officers can deal with minor offences. Trials by Court Martial are held in open Court, and all Courts will be held within a reasonable distance of the scene of the crime.

It was pointed out by Professor Goodhart, who is both a distinguished American lawyer and Corpus professor of English law at Oxford, in a letter to the *Times*, that "the Act, by giving full jurisdiction in criminal matters to the American Courts, does not place the American soldier above the law, but is directed to putting the full responsibility for the discipline of its members directly on the American Army itself. It is, therefore, a matter of responsibility and not of privilege." The divergence from the traditional English rule that the most serious criminal offences against persons of the country shall be tried by British Courts may be an innovation in our municipal law of war, but is in accordance with principle, and, we may be assured, in accordance with the cause of Anglo-American understanding. As the Attorney-General pointed out in the Debate on the Allied Forces Bill in 1940: "We are not so much conferring a benefit on our Allies by these special enactments as fulfilling an obligation under international law." At the same time the legislation does extend the old rule of international law because it vests the jurisdiction over the foreign Forces in military tribunals without any restriction of locality to garrison or camp. Again the provision by which the British authorities will carry out the sentences passed by Allied Tribunals modifies the traditional rule by which the Courts of one country will not execute the penal law of another. International law, as well as municipal law, cannot be unaffected by the general "mixing up."

NORMAN BENTWICH.

The Allied Powers (War Service) Act

By the Allied Powers (War Service) Act, 1942 (5 and 6 Geo. 6, ch. 29), the nationals of Allied Powers have been, under certain conditions, made liable to national service under the National Service Acts, 1939 to 1941. Until now the National Service Acts, 1939 to 1941, which introduced the liability of men and—since 1941—women to national service, were applicable to British subjects only; the Allied Powers (War Service) Act, 1942, extended the applicability of these Acts to male—but not to female—nationals of Allied Powers who are in, or subsequently come to, Great Britain, and who are within the age limits specified for British male subjects by proclamation, made under the National Service Acts. This applicability to nationals of Allied Powers is, however, dependent on two conditions. Firstly, according to s. 1 (1) of the Act, there must be issued an Order in Council specifying the Powers to the nationals of which the

Act shall apply. This means that the liability of the nationals of different Allied Powers does not necessarily become effective at the same time. Secondly, according to s. 1 (2) of the Act, only those nationals of the Allied Power specified in the Order in Council are subject to national service who are neither, at the expiration of two months from the material date, members of the armed forces of the Power of which they are nationals, nor holders of a certificate of exemption issued by the Government of this Power. The material date is, according to s. 1 (3) of the Act, the date at which the Order in Council comes into operation in the case of a person who is within the limits of age specified, by proclamation under the National Service Acts, for British subjects—who, in other words, would be liable to national service at the time when the Order in Council comes into operation if he were a British subject. In the case of a person who at the time when the Order in Council comes into operation would in view of his age not be liable to national service if he were a British subject, the material date is the date on which a proclamation issued under the National Service Acts first specifies for men limits of age under which the Allied national falls.

The question arises how far the Allied Powers (War Service) Act has affected British law,[1] as far as it relates to the position of the Allied forces present in the United Kingdom and to its members. The law had been based until now on the Allied Forces Act, 1940, and the two decisions of the High Court of Justice rendered in the case *In re Amand* ([1941] 2 K.B. 239 and [1942] 1 All E.R. 236).[2]

By the Allied Forces Act the armed forces of Allied Powers present in the United Kingdom were given a legal status from the standpoint of British law. The courts and authorities of these Forces were by this Act authorised to exercise, in relation to members of these Forces, in matters concerning discipline and internal administration, such powers as were conferred upon them by the law of the Power to which they belong, and by Orders, issued under the Act (Statutory Rules and Orders, 1940, No. 1816, 1817, 1818) the British authorities were bound to lend these Allied courts and authorities their help in enforcing these powers. This regulation referred to the Allied Forces as they existed at the time of the enactment; the Allied Forces Act said nothing about how these forces could be supplemented in the future. While, no doubt, these forces could engage volunteers, who, by their joining up, became members of the Allied Forces and thus became subject to the powers of their service courts and authorities, the question arose whether the Allied Powers were authorised to order conscription of their nationals living in Great Britain. The High Court decided in both cases *In re Amand* that the Allied Powers were authorised to order conscription of their nationals and that the British authorities were bound to lend the Allied courts and authorities their assistance in enforcing their powers against those who in obeyance to the conscription order had joined the Allied Force and so had become members of it, and who subsequently had become deserters or absentees without leave.

[1] This note is concerned with British Law only; but the Act under review may also have its bearing on the law of the Allied Powers, not indeed as a source of law, but as a fact. So it may force a national of an Allied Power against his will to disobey a law of his nation forbidding nationals to join foreign armies if his Government, despite his application, does not engage him within the two months mentioned in s. 1 (2) of the Act.

[2] See note on these decisions in 5 M.L.R. 256.

The High Court took this view, although it did not regard the national of an Allied Power who had joined the Forces of this Power in obeyance to a conscription order as having joined them by voluntary enlistment. What, however, was not decided by these decisions—as there was no necessity of deciding it—was, whether the British authorities were bound to lend the Allied courts and authorities assistance in enforcing conscription against a conscript who had not obeyed the conscription order and never joined the Allied Force. A decision of this question would have depended on whether such a man, by the mere fact of being ordered to join the Allied Force, had become a "member" of this force, as the Allied Forces Act and the Orders issued under it conferred powers to the courts and authorities of the Allied Forces and ordered the assistance of the British authorities with regard to members of these forces only.

By the Allied Powers (War Service) Act, the rights exercisable by the Allied Powers with regard to their nationals in the United Kingdom have been restricted in two respects—

Firstly, the liability of a male national of an Allied Power to British national service under the Allied Powers (War Service) Act—his age class having been called up and both conditions mentioned above having been fulfilled—cannot be impaired by measures of the Power to which he belongs or of its authorities, nor by his joining his national force either by voluntary enlistment or by conscription after the expiration of the two months mentioned in s. 1 (2) of the Act.

Secondly, the Allied Powers (War Service) Act defines in s. 5 (1) the term "member" of the armed forces of an Allied Power for the purposes of the Allied Forces Act. This section provides that a person shall be deemed to be a member of the armed forces of an Allied Power, "if he has served in those forces on or after the date of the passing of that Act (namely the Allied Forces Act) and has not been duly discharged therefrom, but a person who has not so served shall not be deemed to be a member of any such forces by reason of his having been called upon to serve therein." By this provision the question left open in the decisions *In re Amand* has been solved. As a national of an Allied Power who has been ordered to join the Allied Forces is not to be regarded as a member of these forces as long as he has not joined them, the courts and authorities of the Allied Forces cannot exercise with regard to such a person in the United Kingdom the powers which have been granted to them by the Allied Forces Act in relation to members of the Allied Forces, and the British authorities are not in the position to give these courts and authorities their assistance by forcing such a person to join the Allied Forces. It is only when the national of the Allied Power has actually joined the Allied Forces, that the powers given by the Allied Forces Act to their courts and authorities with regard to their members, and the right and duty of the British authorities to give them assistance, can be exercised.

Apart from the foregoing restrictions, the Allied Powers (War Service) Act does not alter the existing British law as to the rights exercisable by the Allied Powers and their authorities in the United Kingdom, as it is founded on the Allied Forces Act and on both decisions *In re Amand*. That means that the Allied Powers are, as they were before, authorised to order conscription of their nationals in the United Kingdom; they are not bound to defer such an order to the time when the Order in Council specifying them for the purposes of the Allied Powers (War Service) Act is issued, but can order conscription at any time. Their service courts and

authorities have in relation to those who obey the conscription order all powers conferred upon them by their own law, and the British authorities are bound to give them their assistance in case of a desertion or absence without leave. On the other hand, an Allied Power is not bound by the Allied Powers (War Service) Act to order conscription, not even after the issuing of the Order in Council specifying this Power for the purposes of the Allied Powers (War Service) Act, and a national of an Allied Power has no right under this Act, to be engaged in the forces of this Power, if its authorities do not choose to engage him.

PAVEL HARTMANN.

The Finance Act, 1942

With the increase in the standard rate of income tax to 10s. in the £ as imposed by the Finance Act, 1941, direct taxation probably reached saturation point, especially since all taxable income in excess of £30,000 bears an additional sur-tax of no less than 9s. 6d. in the £. This year's Act is more concerned with administrative adjustments, but for all that it contains some interesting provisions apart from striking increases in indirect taxation as regards drink and tobacco and an increase to 66⅔ per cent in the Purchase Tax upon a large class of non-necessary goods. When the National Defence Contribution—a tax of 5 per cent on the profits of all businesses in addition to the ordinary income tax—was imposed by the Finance Act, 1937 (see 1 M.L.R. 288), it was restricted to the five-year period ended April, 1942, in the vain hope that this country's re-armament would avert the inevitable war; the reader will not be surprised to find that its duration has been indefinitely extended (s. 36). So many changes were made in the scheme of the Excess Profits Tax by the Finance Acts of 1940 and 1941 (see 4 M.L.R. 136 and 5 M.L.R. 130–2) that this year it has been left severely alone by Parliament.

Ss. 10–11, Finance Act, 1941, rendered farmers whose holdings of land exceeded £300 in annual value liable to pay tax on their full profits like any other trader; the writer—at 5 M.L.R. 129—animadverted on this arbitrary minimum and suggested that where a farmer did not pay on actual profits, his notional profit should be fixed at a multiple of the annual value. S. 28 reduces to £100 annual value the minimum below which the farmer does not pay on his real profits, but provides that in such cases the notional profit shall be *three times* the annual value.

S. 34 is especially noteworthy since it is a unique example of the common law relating to the admissibility of evidence in criminal proceedings being changed by a Public Revenue Act. The Court of Criminal Appeal in *R.* v. *Barker*, [1941], 3 All E.R. 33, had held that the practice of the Board of Inland Revenue, which was conditional upon a *full* disclosure of past frauds being made, of accepting pecuniary settlements in lieu of instituting criminal proceedings—see (1923) *Hansard*, Vol. 160, No. 100, Col. 2518—prevented *partial* disclosure thereunder being given in evidence in any subsequent proceedings; s. 34 now renders admissible in evidence any statements made or documents produced, thereby abrogating the decision in *Barker's* case. The high rates of modern taxation and a certain lowering in the ethical standards of a minority of traders have had their inevitable result in a persistent growth of fraud in relation to taxation; recent prosecutions for "Black-Market" offences, in particular, have shown how many of these transactions have been effected by cash payments,

and it may well be imagined that these will not be passed through the ordinary books of account of the trader. S. 35 gives power to the Appeal Commissioners and to the Board of Inland Revenue to require production of such books, accounts and documents of the trader as they shall think fit—this provision should result in the production of many hitherto concealed bank accounts. S. 33 enables the Crown to make good duty lost, and to take proceedings for penalties, as regards any form of fraud or of wilful default at any time instead of, as heretofore, within six years only of the commission of the offence.

A. Farnsworth.

NOTES OF CASES

Arbitration Clause—Whether Applicable after "Repudiation" of Contract by One Party

Where a contract (or simulacum of a contract) between A and B contains an arbitration clause, and B denies that the contract is binding on him, or shows an intention not to perform his part, what is the effect of B's contention or conduct upon the arbitration clause? This important question, which had given rise to various conflicting decisions of the House of Lords and Privy Council (not to mention courts of less high authority), has now received full consideration from the House of Lords in *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337.

Their Lordships pointed out that the answer to the question depends in large part upon the wording of the arbitration clause. Parties may agree to arbitrate anything or almost anything (*per* Lord Wright at p. 353 H)—even, it seems, the question whether their contract is illegal (*per* Lord Wright at pp. 350 C, 353 B). From this it might seem to follow that the only matters for consideration are whether the arbitration clause has been agreed upon, and what it means. However, as to the second question, there must be rules of construction to help in doubtful cases.

We begin, then, by looking at the arbitration clause. This may be wide or narrow. A draftsman who wishes to word his clause in the widest possible way will refer to arbitration all disputes arising "out of" or "in relation to" or "concerning" the contract. It is not desirable to use the word "under," because there is a difference of opinion as to its precise meaning. Lord Porter (at p. 360 H) assumed that it was a narrower expression than the others, but Lord Wright (at p. 352 H) seemed to consider that it had the same result.

Having read the arbitration clause, we next consider the particular dispute that has arisen. For present purposes disputes may be categorised as follows—

(1) Cases where B denies that he ever entered into the contract, or claims that the contract was void *ab initio* (because, for example, the making of such a contract is illegal). According to Viscount Simon, L.C., Lord Macmillan, and Lord Porter (pp. 343 F, 345 H, 360 D), the arbitration clause cannot operate. Obviously, even if A takes the dispute to arbitration and obtains an award to the effect that the contract was valid, the award cannot help A, because it is binding on B only if A's contention is correct. Arbitrators cannot by their award confer a jurisdiction upon themselves

that they would otherwise not possess. Thus A's proper remedy to determine the validity of the contract is by an action in the courts.

Lord Wright's statement of the law was rather different from that of his colleagues. According to him, if B admits that there was the appearance of consent, but claims that the consent was vitiated by mistake or illegality, it would be a question of construction whether the arbitration clause could be treated as severable and could be invoked for settling the dispute (pp. 350 C, 353 A). With great respect it is submitted that, in the case of mistake, the nature of the mistake is more important than the construction of the arbitration clause. For instance, if the mistake is as to the identity of parties (as in *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459), the mistake would inevitably affect the arbitration clause, whatever the wording of the clause. You cannot both think that you are dealing with Blenkiron as regards the main body of the contract and know that you are dealing with Blenkarn as regards the arbitration clause in the same contract. If, in circumstances like those in *Cundy* v. *Lindsay*, you think you are dealing with Blenkiron, you surely cannot be compelled to arbitrate with Blenkarn, even though the contract contains a clause referring to arbitration disputes as to the identity of parties.

Where on the other hand the mistake is not *in consensu* but *in causa* (as where there is a contract for the sale of specific goods, and unknown to the parties the goods have already perished), there seems to be no reason why the dispute should not be treated as falling within a general arbitration clause in the same way as cases of frustration (group (6) below). It may be that Lord Wright was thinking of *error in causa* rather than of *error in consensu*, because he referred (p. 353 B) to contracts being "voidable" for mistake, and it is clearly settled that *error in consensu* makes contracts void, not voidable.

Reverting to the speeches of the other noble lords, a question may be raised as to what they meant when they said that the arbitration clause cannot operate. Does this mean that it cannot operate for any dispute under the disputed contract, or that it operates for all disputes except that as to the existence of the contract (if the latter dispute is decided in A's favour)? In order to answer this question let us divide it into two. Suppose that B claims that he never entered into the contract. A brings an action for a declaration that the contract is binding, and succeeds. (i) A, in the same action, claims damages for breach of contract, or a sum that he alleges to be due under the contract, and B pleads the arbitration clause. Is he entitled to do so? Alternatively, (ii) A initiates arbitration proceedings, and B claims that he is not bound to submit. Is he right? It is obvious that the answer to (ii) is that once the validity of the contract has been determined A can force arbitration upon B, subject to the discretion of the Court under s. 4 of the Act of 1889. Were it not so, a party to a contract containing a general arbitration clause could break the contract and then evade arbitration by the simple process of denying that the contract was made. The answer to (i) is not so obvious. Viscount Simon said (at p. 341 E): "If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains." Does this mean that they would be disentitled from relying on it altogether, or only disentitled from relying on it in the dispute as to the existence of the contract? It is submitted that the answer is as follows. If the arbitration clause is not so worded as to make arbitration a condition precedent to

B's liability, the Court has a discretion under s. 4 of the Act to allow or stay A's action. If on the other hand arbitration is made a condition precedent to the defendant's liability the Court has no power to adjudicate the question of liability unless the defendant has prevented arbitration from taking place (cp. the words of Warrington, L.J., in *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. at 607–8, and of Lord Wright in the present case at pp. 349 F, 354).

(2) B may agree that he entered into the contract but allege that he was induced so to do by fraud, innocent misrepresentation, duress, or the like, and that he has avoided the contract. Here the Lord Chancellor and Lord Macmillan again said that the arbitration clause cannot operate, but Lord Wright again qualified this by saying that the arbitration clause may as a matter of construction be regarded as separate from the rest of the contract and in that case the question whether the contract is voidable may be arbitrable under the clause. Lord Porter (pp. 357 B–G, 360 D) also made the latter point, but remarked that "it may require very clear language to effect this result."

It may be permitted to observe that again the question is too simply treated by saying that it all depends on the wording of the arbitration clause. When the courts come to enquire into the question a little more closely, they may find that something also depends upon (*a*) who is setting up the arbitration clause and (*b*) the nature of the conduct that gives the right to avoid, viz. whether wilful (e.g. duress, fraud) or not. For instance, take two cases. A's insurance company claims to avoid A's policy (which contains a general arbitration clause) on the ground that it was obtained by innocent non-disclosure. (i) A sues the insurance company for the policy moneys, and the company claims that the action should be stayed pursuant to the arbitration clause. (ii) The company sues A for rescission. A claims that the action should be stayed pursuant to the arbitration clause. May there not be a difference between these two cases? The company is the aggrieved party, and if it wishes to affirm so much of the contract as is represented by the arbitration clause and disaffirm the rest, there seems to be no reason why the Courts should not allow it to do so. If the company so elects, the clause should be treated as severable. That would be a solution of (i). In substance it is supported by such cases as *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. 593. As to (ii), it does not at all follow from the fact that the company is entitled to a stay of action that A is so entitled. Even if he is so entitled in a case where he was guilty of mere innocent non-disclosure, would the position be the same if he brought about the policy through active fraud? Would not the company be entitled, if it so wished, to treat the fraud as vitiating the arbitration clause along with the rest of the contract? As the Court put it in *Kennedy* v. *Panama Mail Co.* (1867), L.R. 2 Q.B. at 587, "it is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind."

(3) B admits the agreement but claims that it has come to an end through the operation of a condition subsequent. Such a dispute falls within a general arbitration clause (*per* Lord Macmillan at p. 346 A, Lord Wright at p. 350 C–D). So even if B's contention is that his obligation never commenced owing to the non-fulfilment of a condition precedent (*per* Lord Wright at p. 353 B–G;[1] Lord Parker at p. 360 E). It is obviously

[1] It seems that at p. 353 G, line 3, the word "no" should be deleted.

quite easy in these cases to treat the arbitration clause as severable from the rest of the contract and thus as commencing and continuing irrespective of the rest of the contract.

(4) The parties agree to bring the contract to an end. Here the arbitration clause falls with the rest of the contract (*per* Lord Macmillan at p. 346 A). But suppose B alleges such rescission by agreement and A denies it? Probably the position is the same as in case (1), and the dispute must be determined by the Court—unless, of course, both parties agree to arbitrate. It is no use A's submitting the question to arbitrators without B's consent, because the award of the arbitrators will be binding on B only if A's contention is correct, and this question the arbitrators will not have power effectively to determine.

(5) Suppose that B shows an intention not to fulfil his obligations under the contract. He is then commonly said to "repudiate" it, but their Lordships expressed a very proper dislike for this word. The legal effect of B's conduct is not that the contract is void, or even that it is voidable by A. A, it is true, has the right to treat B's conduct as releasing him (A) from his own obligation under the contract. Thus B's conduct makes A's obligation voidable by A. But if A elects to avoid his own obligation, he does not thereby avoid B's obligation. For A still has a claim against B for damages for breach of contract, and the contract remains as a measure of B's liability for damages. In the present case the House of Lords held that it also remains as to any arbitration clause, for this clause governs the mode in which the extent of B's liability is to be assessed. Thus, on the one hand, A can insist upon taking the matter to arbitration, and, on the other, if A chooses instead to sue B, B can apply for a stay in the usual way. This conclusion is not only perfectly logical but also satisfactory as giving the effect to the arbitration clause that the parties obviously intended it to have. However, it was not arrived at without some vigorous distinguishing by their Lordships of previous decisions. *Jureidini* v. *National British Insurance Co.*, [1915] A.C. 499 (H.L. Eng.), *Johannesburg Municipal Council* v. *Stewart*, [1909] S.C. (H.L.) 117, and *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497 (P.C.), all had to be "distinguished" and "dicta" disapproved. Of the *Johannesburg* case, where Lords Shaw and Loreburn had laid down a rule precisely the opposite of that now adopted by the House of Lords, Lord Wright said (p. 351 F): "On the whole, I think it is impossible to find any clear guidance as to principle or practice from the *Johannesburg* case, except that it affords an instance of the Court's discretion under the Arbitration Act." In support of the conclusion at which they had arrived their Lordships had authority almost if not quite as weighty as that which they had to disregard: *Sanderson* v. *Armour*, [1922] S.C. (H.L.) 117, *Scott* v. *Del Sel*, [1923] S.C. (H.L.) 37, *Champsey Bhara & Co.* v. *Jivraj, etc., Co.*, 1923 A.C. 480 (P.C.), and *Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619 (P.C.). It will be noticed that in all this array of authority the only case technically binding on the House in an English appeal (as *Heyman* v. *Darwins* was) was *Jureidini's*, and this their Lordships succeeded in distinguishing. Had they slavishly followed the dicta in *Jureidini's* case, the result would almost certainly have been to create a divergence between English and Scots law, and moreover a divergence in which the better rule was put to the credit of Scots law. It is a matter for rejoicing that the doctrine of precedent has not brought about this result.

I must not let the last paragraph stand without mentioning that according to Lord Porter in *Heyman* v. *Darwins* (p. 361 H), a Scottish case that has been decided in the House of Lords on the same principles as apply in English law is binding on the House even in an English appeal. See to the same effect Lord Dunedin in *Yaffe's* case, [1931] A.C. at 502. This view has an air of reasonableness; it sounds, for instance, extremely technical to assert that *Donoghue* v. *Stevenson*, [1932] A.C. 562, is not binding upon English courts. It certainly ought to be recognised that a decision of the House on appeal from Scotland, if decided on the same principles as apply in English law, ought to be as good an authority as a decision of the House on appeal from England, *if the later court chooses to regard it as such.* For instance, it ought to be open even to a county-court judge to say that *Donoghue* v. *Stevenson* overruled *Earl* v. *Lubbock*, [1905] 1 K.B. 253, although but for *Donoghue* v. *Stevenson* and the cases following it, he would presumably be bound by *Earl* v. *Lubbock*. Moreover, if there is a conflict between such a case as *Jureidini's* and such a case as *Sanderson* v. *Armour*, the House of Lords ought to be free, even in an English appeal, to prefer its previous decision on the Scottish appeal (being decided on the same principles as apply in English law[2]) to its previous decision on the English appeal. But I think it would be unfortunate to assert that the House in an English appeal is absolutely bound by its own previous decision on a Scottish appeal. The strict doctrine of precedent has already been carried very far, and further extensions seem to be undesirable. Anyway, if we are to talk in terms of the strict doctrine, it is necessary to point out that on the strict doctrine no ruling of the House in a Scottish case can ever be binding in an English case, for the simple reason that no *obiter dictum* is binding and that such a ruling must, for English law, be *obiter*. When the House has before it an appeal from Scotland, as in *Donoghue* v. *Stevenson*, the question for it to decide is a question of Scots law, and any statement that English law is the same must be an *obiter dictum*. It may be said against me that I have here used a two-edged sword, for have I not just argued that *Donoghue* v. *Stevenson* can be treated as having overruled *Earl* v. *Lubbock*? and how can an *obiter dictum* overrule a decision? To which I have no reply except to say that in this particular situation it can. It can, that is, if the later Court is willing to give it that effect. The later Court *can* disregard it, but where an *obiter dictum* wins such general approval as that in *Donoghue* v. *Stevenson* it stands in no need of support from a doctrine of precedent to ensure that it will be followed.

(6) The actual decision in *Heyman* v. *Darwins* turned on Case 5 alone. But something was also said on yet another type of case. B claims that the contract has been "frustrated." According to the *Hirji Mulji* case, this contention does not fall within a submission to arbitration of disputes that arise "under" the contract. This case was not only distinguished in *Heyman* v. *Darwins*, but was also doubted (pp. 343 A–D, 343 G–344 E, 348 B–C, 352, 358 C–H, 361 G–H), and we may feel pretty certain that it would not be followed. It is noteworthy, however, that although the decision in the *Hirji Mulji* case was doubted, the "automatic" theory of frustration, which was one step in the reasoning leading to the decision, was approved (Viscount Simon at p. 343 A, Lord Wright at p. 352 F–G,

[2] I am conscious that this phrase may seem to beg the question, but a meaning can be given to it that will not involve this fallacy. What is meant is that the general legal institution must be one that is recognised also in English law.

and cp. Lord Wright in the *Fibrosa* case, [1942] 2 All E.R. at p. 140 D). This was only *obiter*, and I still cherish the hope that when the "automatic" theory comes squarely before their Lordships it will be reconsidered.

In conclusion, *Heyman* v. *Darwins* is also important on the exercise of the Court's discretion to refuse to stay an action under s. 4 of the Arbitration Act, 1889. It is now clear that the Court should lean towards granting the stay. See the remarks at pp. 344–5, 355 F–H, 356 E–H.

G. L. W.

Contract to Make a Contract—Separation Agreement

When shall we be rid of the idea that there can be no valid contract to make a contract? The idea appears to have been first mooted by Parker, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284 at 288–9, who said that where the execution of a further contract is a term of a bargain, the bargain is unenforceable "because the law does not recognise a contract to enter into a contract." For this particular proposition he cited no authority and suggested no reason. Parker, J.'s dictum has twice been cited with approval by the Court of Appeal, notwithstanding the fact that agreements for leases, for mortgages, and for settlements are of everyday occurrence, and that no doubt has ever been thrown upon their validity. Of course, an agreement to contract may fail of being a binding contract either because the parties do not intend to be bound until the second contract is concluded or because the terms of the second contract are as yet uncertain; but this is quite different from saying that a contract to contract is necessarily void.

These remarks are prompted by *Morton* v. *Morton*, [1942] 1 All E.R. 273, where a husband and wife drew up heads of agreement for separation, and therein agreed to enter into a separation deed on like terms. No deed was ever entered into. It was held by a Divisional Court of the P.D.A. Division that the agreement was binding. The decision is unexceptionable, but some misunderstanding may be caused by the closing words of the sentence in which Lord Merriman, P., said (at p. 275): "The commonest thing in the world, in these matrimonial causes, . . . is to draw up heads of agreement, which are afterwards to be put into more solemn form, if the parties so require; but to say, in effect, that this is nothing more than a contract to make a contract seems to me to be impossible." Probably by the concluding words of this sentence the learned President meant that this was a valid contract in itself, and not a mere agreement to make a contract in the future, where the precise terms of the later contract are not yet agreed. If he meant this, the decision may well be taken as exploding the dictum of Parker, J.

G. L. W.

Measure of Damages—Contract for the Sale of Land

In *Thomas* v. *Kensington*, [1942] 2 K.B. 181, Stable, J., considered an interesting problem as to the measure of damages on breach of a contract for the sale of land, in rather exceptional circumstances.

The plaintiff lent £300 to the defendant, receiving a promissory note, payable three months after date, for £330, and it was further agreed that in the event of the note's not being paid on the said date, the plaintiff

should have an option on one acre of the defendant's estate with a frontage of not less than ninety feet in full settlement of the obligation, such acre to be selected by the defendant.[1] On failure by the defendant to redeem the note, the plaintiff opted for the acre of land, and it was for breach of this undertaking to select and convey that the present action was brought.

The question was whether the ordinary rules as to measure of damages applied, under which the plaintiff would receive substantial damages for loss of his bargain, or whether nominal damages, limited to cost of investigating title, etc., were alone recoverable under the rule laid down in *Flureau* v. *Thornhill*[2] (confirmed by the House of Lords in *Bain* v. *Fothergill*).[3] It was urged in support of the latter view that the land in question had been mortgaged (to the knowledge of the plaintiff) and that the defendant was therefore unable to make a good title.

The learned judge held that the breach of contract was caused, not by any want of title in the defendant, but by his default or at most his inability to redeem the mortgage due to his financial embarrassment, a distinction drawn by Sergant, J., in *Daniel* v. *Vassall*,[4] at 410, "whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance."

The basis of the doctrine, restricting the amount of damages recoverable on the breach of contracts for the sale of land, has been rested on (*a*) the implication of a condition (Blackburn, J., approving Parke, B.,[5] that the defendant should not be responsible for damages for loss of the bargain where inability to complete is due to a defect in title beyond his control; (this is better regarded as an implied term than a condition), or (*b*) the difficulty of proving title and the attendant uncertainties being in the contemplation of the parties places damages for loss of the bargain beyond the scope of the rule in *Hadley* v. *Baxendale*, a view sponsored by Lord Hatherley: "It is recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectually made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."[6] In either view, this restriction has been zealously applied since *Bain* v. *Fothergill*, for, although Lindley, M.R., in *Day* v. *Singleton*[7] and others have emphasised that it should not be extended, yet it safeguards vendors against evasions by the

[1] In the headnote to this case as reported in [1942[2 AllE.R. 263, line 5, this selection is attributed to the plaintiff, apparently in error.

[2] (1766), 2 W.B.1, 1078.

[3] (1874), L.R. 7 H.L. 158.

[4] [1917] 2 Ch. 405 at 409.

[5] *Sikes* v. *Wild* (1861), 1 B. & S. 594, and *Walker* v. *Moore*, 10 B. & C. 416.

[6] Cf. Lord Chelmsford, L.R., 7 H.L. at 203. An interesting parallel may be noted in regard to a carrier's liability for loss of market by his consignee through loss of delay through the uncertainties of sea transit, see *The Parana*, [1876] 2 P.D. 118, followed in *The Notting Hill*, [1884] 9 P.D. 105, though the increased reliability of steam ships lead by 1902 (*Dunn* v. *Bucknall*, [1902] 2 K.B. 214, to the assimilation of this branch of the law to that of land transit as laid down in *Collard* v. *S.E. Rly. Co.* (1861), 7 H. & N. 79. Doubtless the registration of title will, directly or indirectly, produce a like result.

[7] [1899] 2 Ch. 320 at 330.

plaintiff of the necessity to allege and prove fraud, if fraud, and not mere innocent misrepresentation, is the real gist of his plaint. As Lord Chelmsford said: "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchases cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."[8]

In the instant case, the learned Judge rightly held no such consideration arose. The title was perfect, subject to the mortgage. The vendor's failure to perform could, at best, be explained by pecuniary embarrassment; he had a means of acquiring title by redeeming the mortgage or otherwise obtaining the release of the acre selected; "the fact," said Stable, J., at 184, "that he (plaintiff) knew that there was a mortgage on the property does not seem to me to put the case within the principle of *Flureau* v. *Thornhill* and outside the principle stated by Sergant, J., in *Re Daniel, Daniel* v. *Vassall.*"

As no ground for restricting the damages existed, the plaintiff was awarded £450 damages, including compensation for the loss of his bargain.

T. H. Tylor.

[8] L.R. 7 H.L. at 217.

Liability for Independent Contractors

The legal interest of the decision in *S.S. Pass of Ballater* v. *Cardiff Channel Dry Docks & Pontoon Co., Ltd.*, [1942] 2 All E. R. 79, lies in the observations of Langton, J., on the scope of the employer's liability for the negligence of an independent contractor. These observations certainly emphasise the trend noted by Salmond[1] of a steady increase in the scope of the employer's liability.

The defendants, engaged in repair and refitting work on the plaintiff's ship, an oil-tanker, employed a local expert for the testing of the absence of gas in the different parts of the ship, previous to their carrying out the repair work. A heavy explosion, due to the ignition of a mixture of air and petrol vapour, caused much damage. The engineer was held to have been negligent in the way he carried out the inspection of the ship. The judge also found that he was a sub-contractor, not an employee of the defendants. The question was, therefore, whether the defendants were liable for his negligence. The principal authority in support of such liability was the decision of the Court of Appeal in *Honeywill & Stein* v. *Larkin Bros.*,[2] where specialists in acoustic work were held liable to a cinema company for the negligence of photographers with whom they had contracted to take flashlight photographs in the interior of the cinema. The liability was based on the character of the operation as an extra-hazardous act, but Langton, J. rightly criticised the language used by Slesser, L.J., that the respondents assumed an obligation to the "cinema company which was, as we think, absolute, but which was at least an obligation to use reasonable precautions to see that no damage resulted to the cinema company from these dangerous operations, that obligation they could not delegate. . . ." Langton, J. doubted whether the word "absolute" was really intended to mean what, on the face of it, it does mean, and interpreted the duty as one to use reasonable precautions when dealing "with

[1] *Torts*, 9th ed., p. 117.
[2] (1934) 1 K.B. 191.

substances or materials which are dangerous in themselves," and in that case the contractor could not escape through employing a sub-contractor. The learned judge himself formulated the following rule—

1. In normal cases, which do not necessitate or involve the use of materials or instruments which are in themselves dangerous, a man is . . . not liable for the acts of a sub-contractor.

2. To this rule there are two exceptions—

(*a*) where a special duty is laid by statute upon an individual or a class of individuals either to take care or even to ensure safety (an absolute duty in the true sense) that person or class cannot delegate the duty so imposed upon them.

(*b*) where the introduction of implements or substances dangerous in themselves, such as flame-bearing instruments or explosives, are necessarily incidental to the work to be performed, a contractor is equally bound by an unescapable duty. In either of these two cases liability extends to the acts of an independent contractor.

Langton, J., quoted Lord Blackburn's famous dictum in *Dalton* v. *Angus*,[3] which is, however, not thus limited. "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

Mr. Chapman has convincingly shown[4] that this clear-cut and simple principle has since been lost sight of in theoretical controversy, but does, in fact, represent the law. It matters not whether that duty is one imposed "by statute or by contract or by common law in tort."

This has since been borne out by such decisions as *Matania* v. *National Provincial Bank*[5] and *Wilkinson* v. *Rea*,[6] though *Haseldine* v. *Daw*,[7] without discussion, takes a more limited view of the liability for the torts of an independent contractor. As the present author has suggested before,[8] the whole conception of tortious liability implies a duty not to do wrongful harm to another, and where the harm done by a contractor is incidental, not collateral to his work (a distinction parallel to that between "course of employment," and "contemporary with employment") Lord Blackburn's rule must apply. It is submitted that any limitation to things or operations "dangerous in themselves" is fallacious; for in every branch of the law of tort that category has ceased to have any definite meaning, as the circumstances can make almost anything dangerous in the particular case.

Whether the extension of liability for independent contractors is socially desirable or not, may be a matter for argument. But it is submitted that modern developments favour such an extension. Modern industrial conditions make it a matter of accident whether any of the numerous parties engaged in a complex building or manufacturing process is a sub-contractor, or, by way of amalgamation, becomes a servant. Economic independence is hardly any longer a reliable criterion by which to distinguish the one from the other.

W. FRIEDMANN.

[3] [1881] 6 A.C. 740.
[4] 50 *L.Q.R.*, 70 *ssq.*
[5] [1936) 155 L.T. 74.
[6] (1941) 2 All E.R. 633.
[7] (1941) 3 All E.R. 156.
[8] 1 *M.L.R.*, 39 *ssq*

Constructive Trustees and Trustees *de son tort*

Trustees' solicitors, like their bankers and other agents, are answerable to their employers only, and not to the *c.q. trustent*. And they are not to be made constructively liable merely because they act as agents for trustees who are guilty of breach of trust. These propositions, based on principles of Equity, are thus stated in Cordery on *The Law Relating to Solicitors* (3rd Ed., pp. 146–147), citing *Gray* v. *Johnston* (1868), 3 H.L. 1, *Keane* v. *Robarts* (1819), 4 Madd. 332, *Nicholson* v. *Knowles* (1820), 5 Madd. 47, *Watkins* v. *Maule* (1823), 1 L.J. (O.S.) Ch. 82, and *Coleman* v. *Bucks Bank*, [1897] 2 Ch. 243, in support of the first proposition, and *Lockwood* v. *Abdy* (1845), 14 Sim. 437, *Maw* v. *Pearson* (1860), 28 Beav. 196, *Barnes* v. *Addy* (1874) 9 Ch. App. 244, *Re Blundell* (1870) 40 Ch. D. 370, *Rae* v. *Meek*, 14 App. Cas. 558, at p. 568, *Alleyne* v. *Darcy* (1855), 4 Ir. Ch. 199, at pp. 204, 208, *Brinsden* v. *Williams*, [1894] 3 Ch. 185, and *Mara* v. *Browne*, [1896] 1 Ch. 199 in support of the second proposition. The latter case and *Barnes* v. *Addy* were cited in the judgment of Bennett, J., in *Williams-Ashman* v. *Price and Williams and Another*, [1942] Ch. 219, 111 L.J. Ch. 157, 166 L.T. 359, 86 [Sol.J] 49, 1942 1 All E.R. 310) in which it was held that where a solicitor acts for the trustees of a fund and acts throughout in accordance with their instructions, not intermeddling in any way in the execution of the trusts and at the same time acts honestly, he is under no liability to the beneficiaries if the funds are not applied in accordance with the trust. The writer of the interesting editorial note to the All England Law report observes that "the decision does not concern the remedy of the beneficiaries against the trustees themselves, nor indeed that of the trustees against the solicitor." This observation, from another standpoint, may be related to that in Cordery on Solicitors (*supra*) where the learned author stated that "the solicitor even though guilty of actionable negligence will generally escape liability as a constructive trustee if there are trustees in existence under whose lawful order he acts," citing *Mara* v. *Browne* (*supra*). The writer of the note to this report adds that *Williams-Ashman* v. *Price and Williams, etc.*, "is a strong one, for the solicitor concerned actually drew the trust deed, but that is not held to fix him with such notice of trust that he was bound to warn the trustees that . . . they were making an improper investment." It was found as a fact that at all material times the solicitor who carried on the practice of the firm was unaware of the precise terms of the trust, though he could have easily ascertained them. This seems to make the judgment even stronger.

The net result of the judicial *dicta* in *Soar* v. *Ashwell*, [1893] 2 Q.B. 390 at p. 394, and *Barnes* v. *Addy* (*supra* at pp. 251–252) is that Equity places the liability of an express trustee or in other words imposes trusteeship *de son tort* upon a person who assumes trusteeship, with or without the consent of the true trustee, and as a result thereof acquires possession of or domination over some part of the trust property. A statement of principle contained in Underhill's *Law of Trusts and Trustees* (9th Ed. at p. 548) based on observations of Stirling, J., in *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, as presented in support of the contention of the plaintiff in *Williams-Ashman* v. *Price and Williams, etc.*, that the solicitors owed a duty to the beneficiaries to see that money come to the possession of the solicitors on repayment of a mortgage, being trust money, should be dealt with in accordance with the terms of the trust of which they were subject was considered by the Bennett, J., as inapplicable in the circumstances. The

statement in Underhill is as follows: "Where trust funds come into the custody and under the control of a solicitor, or indeed anyone else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts." Bennett, J., thought that the contention of the plaintiff amounted to a proposition which neither Stirling, J., nor the late Sir Arthur Underhill could have had in mind when they used the words relied upon. The observation of Stirling, J., must be read in relation to the facts with which he was dealing.

It would seem that either knowledge that the money is being applied in a manner inconsistent with the trust, or of course a person actually becoming a trustee *de son tort* forms the criterion of liability. In exposition of general principle *Williams-Ashman* v. *Price and Williams, etc.*, may be regarded as a development of *Morgan* v. *Stephens* (1801), 3 Giff. 220 (see especially at p. 226) cited in the judgment of Bennett, J., and also *Mara* v. *Browne* (*supra*). It is submitted that the decision of Bennett, J., does not weaken the statement in Underhill above cited, since the effect of the judgment is that, in the circumstances, the solicitor did not have notice of the *trusts*, which was not identical with notice of the fact that the moneys were moneys subject to a *trust* or in other words trust moneys.

BERTRAM B. BENAS.

Terminology of Wills

Dicey in his *Law and Opinion* rendered a great service in renewing, by way of his illuminating chapters, recognition of the relation between the working of the law and the state of public opinion. By public opinion for this purpose is meant more than mere "opinion"—rather the social consciousness of the people as a whole. The case which has prompted these reflections is the recent one of *Re Morgan, Morgan* v. *Morgan*, reported in 1942 2 All E.R. 30. The testatrix by her will directed that all monies of which she died possessed should be shared by her nephews and nieces. She possessed considerable investments, cash at the bank and (*inter alia*) household goods and freehold properties. She left a pecuniary legacy and specific devises of certain cottages. A freehold parcel was not disposed of. The Court of Appeal held that the direction in the will as to monies did not cover the investments, the freehold property not specifically disposed of, or the household goods, and that the word money in a will must be construed in its strict sense unless there is a context which permits of an extended meaning being given to it. The Court held that in the case in question there was no such context. There was much citation of authorities in the course of the arguments and Lord Greene, M.R., in his judgment said that the appeal raised in an acute form a question upon which a great deal had been said by way of criticism of the existing law with regard to the matter. Farwell, J., in the Court of first instance, held that the words of the will, "all moneys of which I die possessed," did not cover either the investments, which were, of course, things which could be expressed in terms of money, or the freehold not specifically disposed of, or the household goods. Farwell, J., had found himself bound by the rule which had become so firmly established that Lord Greene felt that the Court of Appeal, however anxious it might be, if it could, to alter it, was not, in Lord Greene's opinion, competent to do so. The rule is that the word money must be construed in its strict sense unless there is a context which permits of an extended meaning being given to it. The Master of the Rolls proceeded to show

that the strict sense of money is a sense which has been invented by the Courts partly to get rid of the rigour of the rule which would have existed if the word money had been confined to actual cash, which, no doubt, was the original meaning. The Courts felt that that was going too far, so they invented a special category which was called "Money in the strict sense," which includes money not in any strict sense, because it includes choses in action, such as moneys on drawing account at the bank. The category, however, was closed, and the Court would not extend the language in the absence of context permitting. The rule went back as far as 1725, (*Shelmer's case*, Gilb. Ch. 200) which case evoked the most interesting observations of his Lordship in respect of the relationship between "Law and Opinion," to borrow Dicey's memorable phrase. His Lordship observed, "It may be that the rule was in operation earlier; but in those days social habits were very different from what they are now. Investments in the modern sense did not exist then, and the number of people who had money in the funds in those days was comparatively small." "In the year 1923" (when *Re Taylor*, [1923] 1 Ch. 99, came before the Court) the numbers of the investing public, in the modern sense, had, of course, grown enormously. . . . At the present time there are millions of persons of comparatively humble position who have put their savings in the Saving Certificates, War Bonds, and so forth. Persons of that kind would inevitably, in ninety-nine cases out of a hundred, refer to these investments as their money. It seems to me that it would be a grave national misfortune if persons of that kind, dealing with these investments, were to make home-made wills, as, no doubt, many of them will and, using the first phrase that comes to their minds, describe them as their money, and thus succeed in dying intestate with regard to their savings. I cannot help thinking that in the year 1923 it would have been possible for the Courts to have taken into consideration and given effect to the totally changed social conditions in the matter of investment which existed then as compared with the time, 200 years ago, when this rule began to fasten itself upon the Courts. In those days the harm which the rule could do was trifling compared with its effects to-day." His Lordship, however, felt that the Court was not entitled to take that matter into account when, in 1929, *In re Gates*, [1929] 2 Ch. 420, the Court of Appeal obviously did not pay attention to any such matter, for then the old rule was re-enunciated. In an earlier part of judgment the Master of the Rolls remarked that it would be perfectly open to the House of Lords to reconsider the matter, for he regarded the present state of the law upon this point as a blot upon our jurisprudence. The editorial note observes that leave to appeal to the House of Lords was given and if the parties decided to avail themselves of that leave the matter would be open for review by the House. Here is a case calling for appellate reconsideration and this reconsideration, the report shows, was hoped for by all the members of the Court, yet if the possible appellant cared to let the matter rest as it stands at present the law will remain in the state which the Court of Appeal had to recognise, but felt the need to censure, as expressed in the forcible words of the Master of the Rolls. Perhaps such cases as these give rise to the curious saying "Hard cases make good law"; actually this is bad law producing hard cases, which may eventually result in amendment laying down good law. As Lord Greene has shown, law which may have become bad by changing circumstances can, in its time, have been good. The necessity of co-relating law with the changing circumstances is thus illustrated by the records of English

law. Ampler facilities for enabling appellate review would greatly enhance the advantages of the inherent elasticity of the English Legal System.

BERTRAM B. BENAS.

Commorientes

In re Lindop, Lee-Barber v. *Reynolds*, 58 T.L.R. 291, [1942] 2 All E.R 46, is a case breaking new ground, since it appears to be the first reported decision in interpreting the effect of the words "subject to any order of the Court" in s. 184 of the L.P.A., 1925, the section which raises a statutory presumption of survivorship in order of seniority in respect of commorientes with regard to claims to property for the purposes of affecting title. In an air-raid a man and his wife, occupants of a house, were killed. It was uncertain who died first, but affidavit evidence of a leader of a rescue squad and of a doctor who called in shortly after the raid testified that death had occurred instantaneously and simultaneously. The husband, who was older than his wife, had bequeathed to her the residue of his estate, and she had bequeathed her residuary estate to her mother, or brothers and sisters, and a legacy to her husband.

The judgment of Bennett, J., affords another instance (*pace* the well-known dictum of Sargant, L.J., in *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62, at p. 84) of the judicial confirmation of views upon the New Property Legislation expressed by the late Sir Benjamin Cherry and his editorial colleagues in the *magnum opus*, *Wolstenholme and Cherry, Conveyancing Statutes*, for in the note to the section in the first Edition (1925) to appear upon the enactment of the legislation (11th Ed., Vol. I, p. 443) after referring to the fact that the provision was new and removed the difficulties shown by *Wing* v. *Angrave*, 8 H.L.C. 183, *Re Alston* (1892), P. 142, and *In bonis Beynon* (1901), P. 141 observed that "'Subject to any order of the Court,' it is still open for the Court to hold as the fact that the deaths were simultaneous or occurred in any particular manner." The learned judge held that the quoted words of the section meant that the statutory presumption is a rebuttable presumption, and the Court is entitled to receive evidence which may displace the statutory presumption. His Lordship drew a distinction between killing and dying, a verbal refinement which clarifies itself upon analysis by the illustration provided in the judgment itself. "Two birds may be killed, each being struck at exactly the same moment by a different pellet coming from the same cartridge, but there may well be a considerable period of time between their deaths" (p. 49 of the All E.R.). His Lordship, it would seem, regarded the *cause* of death in such a case as simultaneously operating, or, put in another way, identical, but the *effect* not necessarily coincidental in occurrence. *Re Lindop* (*supra*) would appear to suggest that evidence of a conclusive and not merely of an opinionative character, however expert, will be requisite to rebut the statutory presumption.

The practitioner will have noted that the case came on by the normal method of summons, the questions for determination being those arising on deaths of *commorientes*. The parties to the summons were the executor of the husband, plaintiff, the executors of the wife, the first two defendants, and the sole next of kin of the husband, the third defendant. Costs were ordered to be taxed between solicitor and client and paid out of the estate.

By a few weeks a case of similar character, except of course that the deaths were not due to air-raids, missed the operation of the L.P.A., 1925, so much so that a reference to the date of the reports, 1927, would not

suggest that it did not come within its ambit. The case is that of *In re Nightingale Hargreaves* v. *Shuttleworth*, reported in 64 *Law Journal* Notes of Cases 34, and also in 71 Sol. J. 542. The case formed the subject of a leading note in the *Solicitors' Journal* (71 Sol. J., at p. 550, 9th July, 1927), wherein it is observed the case was "likely to be the last in which the principle laid down in *Wing* v. *Angrave*" (*supra*), "namely that there is no presumption in law as to survivorship among persons whose death is occasioned by one and the same cause would be applied. There, in December, 1925, the husband and wife were killed in the same accident, but there was no evidence to show which of the two died first. In these circumstances Eve, J., had no alternative but to apply the *Wing* v. *Angrave* doctrine, with the consequence that the husband's property, he having died intestate without next of kin, passed to the Crown. If instead of happening in 1925, the accident had occurred in 1926, the provisions of s. 184 of the L.P.A., 1925, would have been applicable. . . . Was the change in our law made, one wonders, out of academic zeal for correctness of doctrine, or may there be something in the observation of a learned commentator on the Act of 1925 that the alteration is likely to increase death duties?" It would seem likely that the learned commentator referred to was that eminent conveyancer, the late Mr. W. F. Webster, who in his lectures on the New Property Acts, delivered to the Cambridgeshire Law Society, and published in the *Conveyancer* (old series, Vols. 11 and 12) observed (Vol. 12, p. 3): "It remains to be seen whether in the event of father, mother and three sons dying in an earthquake or shipwreck, the State will claim five estate duties." A reference to Comparative Law, some points as to evidence and the earlier cases, are contained in Carson's *Real Property Statutes*, 3rd Ed., at pp. 181 and 182, in the course of an interesting note. Reference may also be made to *In re Pitts, Cox* v. *Kilsby*, 1931, 1 Ch. 546, at p. 551, and *Re Sigsworth, Bedford* v. *Bedford*, 1935, Ch. 89, at p. 91.

BERTRAM B. BENAS.

In view of the unexpected prominence which the war has given to s. 184 of the Law of Property Act, 1925, it is difficult to resist the temptation of adding to Mr. Benas' learned note a few words of comment on the Private International Law aspect of this matter. Here, as so often in English law, a presumption is the cloak for what is in fact a rule of substantive law. There are at the moment in this country numerous persons with a foreign domicil whose moveable estate must be distributed in accordance with foreign law. What happens if two or more of them perish in an air raid in circumstances similar to those of *Re Lindop*? Will the Court classify s. 184 as a rule of procedural law and apply this English presumption as part of the *lex fori* though the distribution of the property itself is governed by a foreign system? Or will it consider the *commorientes* provision of the Act of 1925 as part of the English law of succession which cannot claim application in a case in which the deceased was domiciled abroad? Here is a question of classification or characterisation which Dr. Cheshire and Dr. Robertson would probably regard as a matter of "secondary" classification. The treatment of presumption in Private International Law is a very intricate problem. Strictly speaking, every presumption, whether statutory or otherwise, is a rule regulating the burden of proof. This is at least true where, as in the present case, the presumption is rebuttable. The burden of proof is governed by the *lex fori*.

Thus, although a case may have no contact at all with English law, it may ultimately come to be decided in accordance with English law, just because there is an English presumption which the Court will apply. An extreme example of this is afforded by the decision of Langton, J., in *The Roberta*, 58 LL.L.R. 159. On the other hand, however, there seems to be a growing realisation that English rules of evidence are frequently part of the substantive law, and that, in certain cases at least, English Courts must apply principles of foreign law which English law would classify as part of the law of evidence. This new tendency has found expression in the decision of the House of Lords in *Hartmann* v. *Koenig* (1933), 50 T.L.R. 114, and also in the decision of Branson, J., in *St. Pierre* v. *South American Stores* (*Gath and Chaves*), *Ltd.* (1937), 1 All E.R. 206. Which of these two tendencies would prevail in a case under s. 184 of the Law of Property Act, 1925, it is difficult to say. Where *all* the *commorientes* are domiciled in the same foreign country, it would seem to be in accordance with the spirit of English conflict rules to apply foreign law, but this is not necessarily the case where the various deceased persons are domiciled in different countries.

In conclusion, and as a matter of curiosity, it may be of interest to quote the corresponding rule of German law: "If several persons have perished in a common danger, it is presumed that they have died simultaneously" (Civil Code, Art. 20). O. K. F.

Is a Directorship of a "Private" Company a "Public" Office?

In *McMillan* v. *Guest*, [1942] 1 All E.R. 606, the House of Lords finally resolved doubts that had long existed regarding the taxation of income arising from directorships in "private" companies. In the first place, could such directorships be regarded as "offices" of a *public* nature, and, secondly, was such a director within the scope of the taxing acts if he neither resided in this country nor exercised any of his duties as director here? Rule 6, Schedule E, Income Tax Act, 1918, provides that tax thereunder shall be paid "in respect of all *public* offices *within* the United Kingdom, viz. . . . (*h*) offices, etc., under *any* company or society whether corporate or not." The facts in the instant case were, briefly, that the appellant was a director of a "private" British Company controlled in this country and therefore resident here, *vide De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; he himself had been resident in the U.S.A. for many years, during which period he had not exercised here any of his functions as director; under the Company's articles of association he was remunerated by a fixed percentage of its net profits.

An essential difference between an "office" and an "employment" is that its existence is independent of, and unconnected with, any particular holder, although a degree of permanency is requisite (see *G.W.R. Co.* v. *Bater*, [1922] A.C., at p. 28). The Companies Act, 1929, divides companies into two classes, viz. "public" and "private"; the latter need issue no prospectus nor even have directors, while the number of shareholders must not exceed fifty. "Private" companies must, however, be registered under the Act and keep an official register of their members, while if they have directors, many of the duties and obligations imposed upon these officers in the case of public companies are equally applicable. It was held that the public character of the so-called "private" company was established by the mere fact of its incorporation under the statutory machinery of the

Companies Acts and its subjection to the provisions thereof; moreover these Acts imposed certain duties on the office of director and on its holder even in the case of a "private" company. In the result, therefore, the question posited was answered in the affirmative, viz. a directorship of a "private" company is for all purposes a "public" office.

As regards the locality of a directorship, it was held that this was situate where the company must be deemed to be resident, i.e. in this country; the dictum of Rowlatt, J., in *Proctor* v. *Ryall* (1928), 14 Tax Cas. 204, to the contrary, i.e. that "the place where the directorship was exercised" determined its locality was specifically disapproved. Both in the Court of Appeal and in the House of Lords the question of the locality of a directorship of a British company resident abroad, cf. *Egyptian Delta Land & Investment Co., Ltd.* v. *Todd*, [1929] A.C.1, was reserved, it being rightly suggested, however, that in such a case the office would not be held to be "within the United Kingdom."

A. FARNSWORTH.

REVIEWS

CIRCUITS AND REFORM

In the course of this book[1] of what Lord Justice MacKinnon is pleased modestly to describe as "discursive recollections," the author offers the opinion that most books of legal reminiscences are bad; and excepts only from this judgment *Pie Powder*, by J. Alderson Foote, K.C., and *As I Went on My Way*, by A. J. Ashton, K.C. The book of Lord Justice MacKinnon will henceforth form a third exception. It is essentially a good book, full of interest for the lawyer and the discerning general reader.

The book is primarily a record, based on journals he used to keep (omitting the more personal passages) of his journeys on circuit during the years 1924–37 as a judge of the King's Bench. It tells of visits and travels to 58 out of the 61 Assize towns of England and Wales, to all the Assize towns, that is, with the exception of Appleby, Oakham, and Bury St. Edmunds. It tells in easy and familiar prose of the Assize Courts in which the judges sit and of the lodgings in which they stay; of the histories and traditions and local customs of these Courts; and of their architectural and antiquarian and artistic interest and merits; or otherwise. One may imagine the interest with which an author of known literary achievement and artistic taste is able to invest a journey to such places as Durham and York and Lincoln; Leicester and Norwich and Cambridge; Ipswich and Chelmsford and Lewes; Winchester and Salisbury and Exeter; Oxford and Bristol and Gloucester; Warwick and Shrewsbury and Carnarvon; Brecon and Lancaster and Carlisle. And, just as the eye of the author is always attracted by any object of curious or artistic interest—an admirable old shop front at Lewes, the War Memorial Cloister at Winchester, the brazier and the branding-iron in the Court at Lancaster—so his ear is always attentive to an unusual or significant name or phrase—to names like Sirdifield or Mynekyme or Fachus or Footherape that came up in Court, to the witness who explained that he knew the lady well enough "to give her the seal of the day."

The author finds occasion also to explain the meaning of certain

[1] *On Circuit*, 1924–1937, by Sir Frank Douglas MacKinnon, Lord Justice of Appeal (Cambridge University Press, 1941). Price 18s.

technical terms in the law: which, of two or more judges of Assize, is said to be "In Commission"; and how it is that a prisoner who pleaded *Not Guilty* could claim to be tried "by God and my country"; and why the sentence of one judge, sitting alone at Assizes, is always said to be the "sentence of the Court." One learns a great deal, incidentally, of the history and organisation of the several circuits, and of the habits of counsel, and the meaning of a Red Bag.[2]

Though the work is primarily a book of recollections, and is not written in advocacy of reform, the author confesses at the close that he thinks the circuit system is capable of reform and improvement, "chiefly to the end that the London litigant may be better treated than he is at present." "There is," he says, "a chronic lack of judges to try cases in London with reasonable dispatch, and consequently every effort should be made to prevent judges wasting their time in attendance on pampered provincials." He is accordingly in favour of eliminating a number of circuit towns of lesser importance (especially in Wales) and of combining counties like Bedford and Northampton in one joint Assize. It is a modest measure of reform.

The staple work of a King's Bench Judge going circuit in our time consists of crime, and motor-car cases and undefended divorce. Nowhere does Lord Justice MacKinnon advert to the abstraction from the jurisdiction of the Common Law Courts of all those matters having to do with the production and sale and delivery of milk and potatoes and pigs and bacon and herrings and other things that are now handled by one or other of the several Marketing Boards. The establishment of these Boards may be said to be a gain to the national economy; it can scarcely be said to be an aid to justice.[3] Alas! no more cases arising out of contracts for the production or sale and delivery of potatoes or of milk are now heard upon the Midland Circuit.

In exchange for this ancient jurisdiction of the Common Law, the judges going the Circuits are now required to try an increasing number of undefended petitions for divorce, a thing wholly alien to the texture and tradition of the Common Law. Hear Lord Justice MacKinnon about it: "The most trying days at Leeds were those on which I had to deal with about 80 undefended divorce cases. This is the only form of judicial work that I have always detested. And I have resented having to do it. I do not know if the task of doing this work on circuit had already been imposed on Judges of the King's Bench by October, 1924, when I accepted a judgeship. But I certainly did not realise I was to be involved in so repulsive and degrading a duty" (p. 112). And again: "I cannot pretend to feel any scruples of conscience or belief as to divorce. I have said that I think Mr. Justice Talbot was the greatest judge I have known. I am quite certain he was the truest Christian, and firmest believer. To him it was not merely boredom and disgust to hear divorce cases: it was pain and grief as well" (p. 113). Moreover, according to Lord Justice MacKinnon, the actual work involved in these cases "would be degrading to the meanest intellect. The textbooks about divorce purport to set forth principles

[2] Among the casual surprises of the book one finds the words of the "Red Flag" set out in cold print at p. 96, with a parody entitled "The Red Bag" to follow.

[3] I have seen one of these Marketing Boards, sitting in a judicial capacity, with the solicitor to the Board *sitting alongside the Chairman* acting at one and the same time as prosecuting counsel and as legal adviser to the Board!

that are said to have been laid down, e.g. as to the exercise of judicial discretion in favour of a petitioner. . . . I have never been able to discover that there really are any principles at all. . . . So I used to sit in savage boredom, listening to the sordid stories. I cannot conceive why these cases cannot be heard in the County Court, and by its Registrar: In fact, they would not tax the powers of the stupidest man who was ever an acting-deputy-Registrar of a County Court."[4]

Not every one will agree with this judgment. None of the regular practitioners in the Divorce Court will agree with it; and none, I imagine, of the Judges of the Probate and Divorce Division, whose common complaint is that their brethren of the King's Bench Division, in handling divorce suits on circuit, show too little appreciation of the technical and legal issues that arise, and are all too light-hearted in their way of dealing with marriage and divorce. On either view there would seem to be good reason to transfer the jurisdiction in these cases away from the King's Bench; perhaps to specially appointed Commissioners with some experience of the Divorce Registry, and the Divorce Division. The institution of marriage is the source of life of the Commonwealth; its making and its dissolution (or annulment) ought obviously to be gravely and reverently considered. Some of the leading practitioners in divorce are of opinion on public grounds that it ought to be more difficult to make a marriage; others are of opinion that it ought to be more difficult to break a marriage. In the common view nowadays each of the spouses is entitled at will to give the other "his (or her) freedom." But if, in deference to the views of judges like Sir Frank MacKinnon and the late Mr. Justice Talbot, the duty to try undefended divorce cases is removed from the Judges of the King's Bench Division, what remains for them to do on circuit? A diminishing number of "running-down" cases (now that the petrol ration is reduced); and an increasing number of cases of crime.

The fact is that the rise of the Marketing Boards and other monopolies, and the assumption of a good deal of judicial and quasi-judicial work by officials of Departments (like the Ministry of Health and the Ministry of Transport), who hold a public inquiry and make a secret report to the Minister, is likely to lead in time to the problem of what to do, in matters of civil jurisdiction. with the King's Bench Judges. The modern worship of the State is scarcely consistent with the maintenance in their integrity of the traditions, and the institutions, of the Common Law.

RICHARD O'SULLIVAN.

THE ADOLESCENT CRIMINAL. A Medico-sociological Study of 4,000 Male Adolescents. By W. NORWOOD EAST, in collaboration with PERCY STOCKS and H. T. P. YOUNG. With Foreword by SIR ALEXANDER MAXWELL. London, J. & A. Churchill, Ltd. 1942. Pp. 327. 112 Tables. Price, **45s.**

Like *Juvenile Delinquents Grown Up*, reviewed in an earlier issue (Vol. V, p. 273), this book is the result of a criminological inquiry of a mainly statistical character, carried out by a large team of research workers. Apart from this similarity, however, there are important differences between the two works. Whereas the Glueck study was of a private nature, the present book may be classified as semi-official. Like Dr.

[4] Other King's Bench Judges have unkindly suggested that decrees in these undefended cases should be granted by the Post Office, in exchange for stamps.

Charles Goring's *The English Convict*, almost thirty years earlier, the inquiry was carried out under the auspices of H.M. Prison Commission for England and Wales, of which the author has been, for many years, a very distinguished member. Whereas the principal aim of the Gluecks was to study the life histories of their group over a long period of years, Dr. East is, like Goring before him, for the time being mainly concerned with one stage in the offender's career.

The author has had the benefit of the advice of Mr. Alec Paterson, the Prison Commissioner in charge of the Borstal institutions. On the statistical side he has been assisted by Dr. Percy Stocks, medical statistician, General Register Office; on the medical side by Dr. H. T. P. Young, senior medical officer at Wormwood Scrubs Prison, and several other prison medical officers; in the collection of social case histories by the group of women visitors at Wormwood Scrubs. The direction of the inquiry, however, has throughout been in his hands. Four thousand lads from London and surroundings, between 16 and 20 years of age, detained at Wormwood Scrubs Boys' Prison between 1930 and 1937 before being transferred to one of the Borstal institutions, represented the human material. No girls were included, nor had the investigators any control group cases at their disposal. The inquiry is of the factor analysis type, excluding full individual case histories. Hereditary and familial, environmental, physical, mental, and personality characteristics have been analysed and tabulated with unsurpassable thoroughness. Within the group, first offenders have been contrasted with recidivists, offenders against property with sexual offenders and others. By way of introduction to each chapter, the literature on the subject in question is briefly summarised, and wherever available the corresponding information regarding the general population is quoted. We are thus given an illuminating picture of the special type of adolescent offender who is found in Borstal institutions. While, owing to the absence of a control group, no definite statements on the causal factors of adolescent criminality can be expected, many probable correlationships have been discovered and many results of previous investigators confirmed. To some extent, comparisons between first offenders and recidivists, or differentiations according to the type of offence, compensate for the lack of a special control group, and in a few cases existing material for the general population could be used for control purposes. "There was no tendency for lads convicted of crime to differ in stature from the general population of artisan town dwellers of the same ages," as studied by the Industrial Health Research Board before the war. As the author rightly stresses, negative findings may also have their significance, as for instance the fact that no relationship could be established between recidivism and stature. This is not in agreement with Goring's findings, and the author suggests that, as Goring's investigation was made before the Mental Deficiency Act of 1913, a considerable number of feebleminded persons may have been among his 3,000 convicts, whereas the corresponding figure for the 4,000 Borstal boys was only 125. The difference in mental standards may explain certain differences in physique. The information given on the physical and mental family histories is particularly useful because it is mostly omitted from investigations of this kind. There is an interesting Table on the effect of previous peno-correctional treatment, which shows that among lads with one previous conviction 42 per cent, and among lads with three or more convictions even 62 per cent, had remained apparently unaffected by their peno-correctional

experiences, and that 47 of the former but only 20 per cent of the latter group had been trying to co-operate. Otherwise, the inquiry was not concerned with questions of treatment.

In a thoughtful concluding chapter, however, an outline is given of the author's views on the future aims of penal reform, especially in connexion with psychological treatment. Dr. East can claim to be one of the pioneers in this field. It was under his direction as Medical Commissioner of Prisons that the first official experiments were made before the war at Wormwood Scrubs Prison, and his cautious views on the subject deserve every consideration. He rightly stresses the dangers that may arise from an indiscriminate application of the "overworked modern term 'psychopath' . . . over-simplification in diagnosis on the one hand and undue complexity on the other tend to obscure the necessity for further research. . . . Research beyond the region of mental disease is necessary if our understanding of instinctive criminal activity is to become more precise. . . . For example, it may show that perverse aggressive and acquisitive conduct, like perverse sexual conduct, is variable in form and causation, and is based upon a special type of personality which is to a large extent unaffected by ordinary penal methods." Such research will have to be done in a special institution where not only abnormal but also certain normal types of offenders could be studied under suitable conditions. The need for such an institution, forcefully stressed in the author's and Dr. de Hubert's pre-war Report on *The Psychological Treatment of Crime* is fully borne out by the results of the present inquiry. The painstaking work of the author and his collaborators has laid valuable foundations for the research centre of the future.

H. M.

THE CZECHO-SLOVAK YEAR BOOK OF INTERNATIONAL LAW. Edited by W. V. Benes, A. Drucker, and E. Taborsky. Published under the auspices of the Czecho-Slovak Branch of the I.L.A. Pp. 236. Price **8s. 6d.**

It is a striking commentary on the interest in the science of international law which is maintained by some of our Allies that, while the *British Year Book of International Law* has not been published during the war, the Czecho-Slovak jurists in this country have contrived to bring out a *Year Book*; and have produced a very valuable collection of studies. They have enlisted the help of some of our leading jurists, Professors Brierly, Keeton, and Berriedale Keith, and they have also obtained articles from Professor René Cassin of the Fighting French Council and from Dr. Schwarzenberger. But the bulk of the matter has been written by Czech authorities, and deals particularly with questions of international law raised by the special position of Czecho-Slovakia and by the presence in England of the Allied Governments, of Allied Forces, and of Allied ships.

The *Year Book* is the continuation of the first Czecho-Slovak scientific review which was dedicated to international law, and was the organ of the Association for International Law in the Charles University in Prague. The editors note in their modest and moving introduction that the *Year Book* appeared at the time when the peoples in the neighbouring states were turning away from international law as the means of guaranteeing human justice, peace, and happiness. Czecho-Slovakia was the bastion in Central Europe not only of democracy, but of international collaboration.

And jurists who found refuge in this country considered it their duty to reinstitute their review on the free soil of the United Kingdom as a means of fulfilling their obligation to that University which has been brutally suppressed.

The first article is by the President of the Czecho-Slovak Republic, Dr. E. Benes, who writes on the rights of man and international law. He stresses that in the New Order provision must be made for fundamental political rights of a collective character, including those of the economic and social relations, such as the rights and duties respecting work and a minimum income. Two of the editors contribute articles, Dr. Taborsky on "International Law in Relation to 'Munich' and the Vienna Arbitration," in which he has no difficulty in showing that the treaties of 1938 have no validity, and Dr. Drucker on the legislation of the Allied Powers in the United Kingdom, which is amazingly varied. Another article which is most informing on a similar subject is by Dr. Schwelb on the jurisdiction in Great Britain over the members of the Allied Forces.

The more theoretical aspects of international law are dealt with by Professor Prochazka, who writes on the Czecho-Slovak philosophy of law, and Professor Brierly, whose theme is law, justice, and war. Besides the articles the *Year Book* contains a full report of the case of *Re N. Amand*, the habeas corpus application in respect of the Dutchman charged with desertion from the Dutch forces; and notes on the constitutional position of the Czecho-Slovak President in exile, together with the principal documents concerning the recognition of his Government in this country. It includes also a learned examination of the Allied Powers Maritime Courts Act, 1941, and of the Diplomatic Privileges Extension Act, 1941. And finally it contains a number of reviews of books on international law. All the articles and notes are in English; and in clear English. The book will be invaluable to international and constitutional lawyers of all countries.

NORMAN BENTWICH.

PUBLICATIONS RECEIVED

THE RECOGNITION OF AMERICAN ARRANGEMENTS ABROAD. By KURT H. NADELMANN. Reprinted from University of Pennsylvania Law Review, Vol. 90, No. 7. 28 pp.

CAT AND MOUSE. Published by the Central Board for Conscientious Objectors. 24 pp. **6d.**